"LAW RELATING TO DAMAGES FOR BREACH OF CONTRACT: AN ANALYTICAL AND COMPARATIVE STUDY OF JUDICIAL TREND IN INDIA AND ENGLAND"

Thesis submitted to the Saurashtra University
for the award of Ph.D. Degree in Law

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`B'

D E C L A R A T I O N

I, the undersigned, declare that my work is based on discovery of new facts and the analysis made by me. The work is based on analysis of provisions of legislation and on observations and directions / judgments delivered by the English Courts and Indian Courts as well.

This is the original work undertaken by me. I have not submitted this work to any other University on any previous occasion.

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C E R T I F I C A T E

This is to certify that the research work embodied in Thesis on "Law Relating To Damages For Breach Of Contract : An Analytical An Comparative Study Of Judicial Trend In India And England" is prepared by Ms. Shaili Arvind Kapadia under my guidance and instruction. The work submitted for award of Ph.D. Degree is his original work. The work has not been submitted for any other degree to this or any other University on any previous occasion.

Date :
Place: Rajkot.

Dr. Nirbhaya K. Indrayan
Professor and Head
Department of Law,
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Rajkot.

Dedicated To,

My Father,
Justice Arvind Kapadia who give me a proud of life,

My Mother,
Jayvanti Kapadia who give me a love of life,

My Brother,
Aprit who give joy and meaning to it all……

`E'

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Date:
Place: Ahmedabad. **Shaili Arvind Kapadia**

`F'

"LAW RELATING TO DAMAGES FOR BREACH OF CONTRACT: AN ANALYTICAL AND COMPARATIVE STUDY OF JUDICIAL TREND IN INDIA AND ENGLAND"

CONTENTS

CHAPTER - I

INTRODUCTION

CHAPTER - II

BREACH OF CONTRACT

CHAPTER - III

BASIC DOCTRINE OF FRUSTRATION OF CONTRACT

CHAPTER - IV

DEVELOPMENT OF DOCTRINE OF FRUSTRATION OF CONTRACT

CHAPTER - V

FOUNDATION OF LIABILITY FOR BERACH OF CONTRACT

CHAPTER : VI

ORIGIN AND HISTORY OF THE TERM DAMAGES

CHAPTER :VII

DEFINITION AND NATURE OF THE TERM "DAMAGES"

CHAPTER - VIII

CONCEPT OF REMOTENESS OF DAMAGES

CHAPTER - IX

KINDS OF DAMAGES

CHAPTER - X

LEQUIDATED DAMAGES AND PENALTY

CHAPTER - XI

QUANTUM AND MITIGATION OF DAMAGES

CHAPTER - XII

CONCLUSION

`G'

LIST OF CASES REFERRED AND ANALYSED

1. 'The Nema', (1981) 2 All ER 1030.
2. "*Chopai*" from Hindu Mythological Epic "*Ramayana*".
3. "The Mediana", (1900) A.C. 113, per Lord Halsbury , cited in *Bishun Singh v. A.W.N. Wyatt*, 14 C.L.J. 515: 11 I.C. 729.
4. *A.B. v. South West Water Services* (1993) Q.B. 507, C.A.
5. *A.F. Ferguson & Co. v. Lalit Mohan Ghosh,* AIR 1954 Pat 596.
6. *A.S. Sharma v. Union of India,* 1995 ACJ 493 at 498 (Gujarat).
7. *Abbake Heggadthl v. Kinhimma Shetty,* I.L.R. 29 Mad. 491 at p 496.
8. *Abdul Ali v. Gokuldas,* AIR 1927 Sind 49 at p. 52.
9. *Abdul Rasak v. Mohammud Hussain,* 38 I.C. 771.
10. *Abdulla Bey v. Tevenham,* AIR 1934 P.C. 91 at p. 92.
11. *Abrahams v. Performing Rights Society,* [1995] I.C.R. 1028,
12. *Acharat Singh v. Sant Singh*. AIR. 1935 Pesh. 57 at p. 58.
13. *Adamkhan Mohammad v. Ramesh Raya Naik*, 1978 A.C.J. 409.
14. *Addis v Gramophone Co Ltd,* (1909) AC 488.
15. *Admiral Shipping Co. v. Weidner, Hopkins & Co.* (1916)] 1 K.D. 436.
16. *Admiralty Commissoner v. S.S. Valeria,* (1922) A.C. 42.
17. *Afovos Shipping Co. SA v. Pagnan,* [1983] 1 All ER 449 : [1983] 1 WLr 195.
18. *Aitken Lilburn v. Ernsthausen,* [1894] 1 Q.B. 773., C.A.
19. *Ajudhia Prasad v. Chaman Lal,* AIR 1937 All. 601 at p. 606.
20. *Akhtar Beg v. Haq Nawaz,* AIR 1924 Lah. 709 at p. 711.
21. *Akshoy Kumar v. Akman Molla*, 27 I.C. 397.
22. *Aktieselskabet Reidar v. Arcos,* (1927) 1 K.B. 352, C.A.
23. *Alder v. Keighley,* 71 R.R. 592 : 15 M. & W. 117.
24. *Alexander v. Home Office,* (1988) 1 W.L.R. 968, C.A.
25. *Allen v. Bloomsbury Health Authority,* [1993] 1 All ER 651.
26. *Allen v. Cameron,* (18330 Cr. & M. 832.
27. *Allen v. Flood,* (1899) A.C. 1.
28. *Allen v. Robles,* [1969] 3 All ER 154 : [1969] 1 WLR 1193.
29. *Allied Maples v. Simmons & Simmons,* [1995] 1 W.L.R. 1602; [1995] 4 All ER 907; [1995] N.P.C. 83; (1995) 145 N.L.J. Rep. 1646, C.A.

30. *Alwar Chetty v. Vaidyalingam Chetty,* 1 M.H.C.R.9.
31. *Amanchi Venkata Ramastrulu v. Nama Venkana,* 37 M.L.J. 355.
32. *Anand Singh v. Ramchandra,* AIR 1963 M.P. 28 at pp. 28,29.
33. *Anglia Television Ltd. v. Reed., [1972] 1 Q.B. 60 : [1971] 3 WLR 528 : 115 S.J. 723.*
34. *Anglo-African Shipping Co. v. Mortner,* [1962] 1 Lloyd's Rep. 81.
35. *Anset v. Marshall*, (1853) 22 L.J. Q.B. 118
36. *Antaios Cia Naviera SA v Salen Rederiena AB, The Antaios,* [1983] 3 All ER 777 : [1983] 1 WLR 1362.
37. *Appleby v. Myers case*, (1867) LR 2 CP 651.
38. *Archer v. Brown,* (1985) Q.B. 401, at 423F.
39. *Archer v. Williams,* (1846) 2 C.& K. 26.
40. *Arendra Singh MotHal Johary v. Karamchand Prernchand,* 1969 GLR 584 at pp. 599. 600.
41. *Arjandas v. Secretary;* AIR 25 Cal 737.
42. *Aronson v. Mologa Holzindustrie,* (1927) 32 Com. Cas. 276, C.A.
43. *Aruna Mills v. Dhanrajmal Gobindram,* (1968) 1 Q.B. 655 at 668.
44. *Ashby v. White,* (1703) 2 Ld. Raym. 938.
45. *Ashdown v. Ingamells,* (1880) 5 Exd. 280.
46. *Associated Newspapers Ltd. v. Bancks,* (1951) 83 CLR 322.
47. *Asstt. Excise Commissioner v. Issac Peter,* (1994) 4 SCC 104.
48. *Astley v. Weldon* (1801) 2 B. & P. 346 at 354.
49. *Atkins v. Kinnier,* (1850)4 Ex. 776: 19 L.J. Ex. 132.
50. *Att.-Gen. of St Chiristopher, Nevis and Auguilla v. Reynolds*, (1980) A.C. 637, P.C.
51. *Attack v. Bramwell,* (1863) 3 B & S. 520.
52. *Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei,* [1976] 1 Lloyd's Rep. 250, C.A.
53. *Australian Consolidated Press v. Uren*, (1967) Argus L.R. 54; (1966) 40 A.L.J.R. 142.
54. *Autry v. Republic Productions, Cal. App.*, 165 P.2d 688, 692.
55. *Avery v. Bowden,* (1855) 5 E & B 714.
56. *Awilco, A/s v. Fulvia SpA di Navigazione, The Chikuma,* [1981] 1 All ER 652 : [1981] 1 WLr 314.
57. *Aziz Khan v.Dunichand,* 48 I.C. 933 (P.C.).
58. *B.P. Exploration & Co. v. Hont,* (1982) 1 All ER 925 : (1983) 2 A.C. 352 : (1982) 2 W.L.R. 253.
59. *Bacon v. Cooper (Metals),* [1982] 1 All ER 397.
60. *Badhava Singh v. Charan Singh,* AIR 1955 Raj. 87 at p. 90 : 1955 Raj L.W. 174: I.L.R. (1954) Raj. 755.
61. *Baetjer v. New England Alcohol Co.,* 66 N.E. 2d 798, 803, 319 Mass, 592.
62. *Baily v. De Crespigny,* LR 4 QB 180.

63. *Bain v. Fothergill,* 91874) L.R. 7 H.L. 158.
64. *Bala Sunder Naiker v. Ranganadham Iyer,* AIR 1929 Mad. 794 at p. 796.
65. *Balammal v. Palaniandi,* AI.R 1938 Mad. 164 at p. 170 : (1938) 2 M.L.J. 340.
66. *Baldeo Krishnan v. Chander Deep Jain*, AIR 1984 P & H 9.
67. *Baltic Shipping Co. v. Dillon,* [1993] 176 CLR 344.
68. *Bana Bhai v. Chandrabhavy,* AIR 1931 Nag 60 at p. 63.
69. *Banarasi Dass & Co. v. Lulla Mull,* 29 I.C. 950.
70. *Banco de Portugal* v. *Waterlow & Sons Ltd.* (1932) A.C. 452.
71. *Bank Line Ltd v. Arthur Capel & Co.* [1922] 2 K.B. 132.
72. *Banke Behari v. Sundar Lal,* I.L.R. 15 All. 232 at p. 253.
73. *Bankline Ltd. v. Arthur Capel & Co.,* (1919) AC 435.
74. *Bannatyne v. MacIver,* [1906] 1 K.B. 103, C.A.
75. *Bansidar v. Bu Alikhan,* I.L.R. 3 All. 260 at p. 265 (F.B.).
76. *Barners v. Port of London Authority,* [1957] 1 Lloyd's Rep. 486.
77. *Barrow v. Arnaud,* (1846) 8 Q.B. 595.
78. *Basnett v. J & A Jackson,* [1976] I.C.R. 63.
79. *Beaumont v. Gresthead,* (1846) 2 C.B. 494.
80. *Beckham v. Drake* (1849) 2 H.L.e. 579 at 598.
81. *Bela Ram v. Sukh Sampat Lal,* AIR 1975 Raj. 40.
82. *Bell v. Lever Brothers Ltd.* (1932) A.C. 161.
83. *Bell v. Midland Ry* (2861) 10 C.B. (N.S.) 287.
84. *Bellingham v. Dhillon,* [1973] Q.B. 304.
85. *Bence Graphics International v. Fasson U.K.,* [1997] 1 All ER 979, C.A.
86. *Bengal Coal Supplying v. Union of India,* (1968) 70 Bom. L.R. 254 at p. 257.
87. *Benhom v. Gambbing, (1941) A.C.J. 157 (H.L.)*
88. *Benson v. Frederick* (1766) 3 Burr. 1845 (assault).
89. *Bensuade & Co. v. Thames and Mersey Marine Insurance Co.,* (1897) 1 QB 29: (1897) AC 609, at pp.611, 612, 614.
90. *Bents Brewery Co. Ltd. v. Hogan,* (1945) 2 All E.R. 570.
91. *Bentsen v. Taylor, Sons & Co. (No. 2),* [1893] 2 QB 274 at 281.
92. *Beramji v. Secretary of State for India,* 1887 P. J. 205.
93. *Berry v. De Costa,* (1856) 1 A. & N. 408.
94. *Best v. Samuel Fox & Co.,* (1952) 2 All ER 394
95. *Betts v. Burch* (1859) 4 H. & N. 506 at 510.;
96. *Bhagawati Prasad v. Shlromani Sugar Mills,* AIR 1949 All. 195 at p. 197.
97. *Bhankno Oujiah v. Harkjh Kandu,* 9 A.W.N. 89.
98. *Bhimji N. Dalal v. Bombay Trust Corporation,* AIR 1930 Born. 306 at p. 315.
99. *Bhola Ram v. Bhagat Ram,* AIR 1927 Lah. 24 at p. 27.
100. *Bhoothalinga Agencies, v. V.T.C. Poriaswami Nadar,* AIR 1969 SC 110.

101. *Bhupendra Narayan Sinha v. Chandramoni Gupta,* AIR 1927 Cal. 277.
102. *Bhuwalka Bros. Ltd. v. Fatehchand Murlidhar,* AIR 1952 Cal 294.
103. *Bhyron Prasad v. Ishare,* 3 N.W. 313.
104. *Bickett v. Morris,* (1866) L.R. 1 H.L. Sc. 47.
105. *Biddell Brothers v. E. Clemens Horst Co.*
106. *Biggin & Co. v. Germanite Ltd.,* (1950) 2 All. E.R. 859, (1951) 2 All. E.R. 191 (C.A.).
107. *Biggins v. Goode,* (1832) 2 Cr. & J. 364.
108. *Bilas Ram v. Ezekial,* 33 I.C. 1 at p. 9.
109. *Bindachari v. Dracup,* 8 Bom. H.C.R. (A.C.) 202.
110. *Birendra Nath Dhar v. Food Corporation of India*, AIR 1978 Cal. 362
111. *Bishoswari Debya v. Govind Pershad Tewari,* 26 W.R. 32.
112. *Bishun Singh v. A.W.N. Wyatt,* 14 C.L.J. 515 : 11 I.C. 729.
113. *Biyth v. Birmingham Waterworks,* (1956) Ex. 781 at p. 783.
114. *Black v. Baxendale,* (1847) 1 Ex. 410.
115. *Blake v. Midland Railway Company,* 88 R.R. 543 : 18 Q.B. 93.
116. *Bliss v. South East Thames Regional Health Authority,* [1987] ICR 700.
117. *Bodley v. Reynolds,* 70 R.R. 640 (8 Q.B. 779).
118. *Bolton v. Mahadeva,* [1972] 2 All ER 1322 : [1972] 1 WLR 1009.
119. *Boone v. Eyre,* (1779) 1 Hy B1 273.
120. *Borrandaile v. Brunton,* 20 R.R. 548 (8 Taunt. 535).
121. *Boston Deep Sea Fishing and Ice Co. v. Ansell,* (1888) 39 ChD 339 at 365.
122. *Bowes v. Press,* [1894] 1 Q.B. 202, C.A.
123. *Boyce v. Bayliffe,* 1 Camp. 58.
124. *Boys v. Ancell* (1839) 5 Bing.N.C. 390 at 396.
125. *BP Exploration v. Hunt*, (1982) 1 All ER 925.
126. *Brace v. Calder,* [1895] 2 Q.B. 253, C.A.
127. *Bradburn v. G.W.R.,* (1874) L.R. 10 Ex. 1
128. *Bradford City Metropolitan Council v. Arora,* (1991) 2 Q.B. 507, C.A.
129. *Bradley v. Walsh* (1903) 88 L.T. 737.
130. *Brahmaputra Tea Co. v. Scarth,* I.L.R. 11 Cal. 550.
131. *Branding v. McNill,* (1946) Ch. 145.
132. *Brandt v. Bowlby,* 36 R.R. 796 (2 B. & Ad. 932).
133. *Bridge v Campbell Discount Co Ltd* [1962] AC 600 : [1962] 1 AJI ER 385, P 395.
134. *British Columbia etc. Saw-Mill Co. ltd. v. Nettleship* (1868) L.R. 3 C.P. 499.
135. *British Industrial Plastics Ltd. v. Freguson,* (1938) 1 All. E.R. 863.
136. *British Motor Trade Association v. Salvadore,* (1949) All. E.R. 208.
137. *British Moveitonews Ltd v. London & Districts Cinemas Ltd* [1951] 2 All E.R. 617

138. *British Racing Drivers Club v. Hextall Erskine & Co.,* [1996] P.N.L.R. 523.
139. *British Transport Commission v. Gourley,* (1956) A.C. 185.
140. *British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.
141. *Broom v. Davis,* [1794] 7 East 480n.
142. *Broome v. Cassell & Co.* (1972) A.C. 1027.
143. *Brown v. K.M. R. Services Ltd.* (1995) 4 All E.R. 598.
144. *Brown v. Muller,* (1872) L.R. 7 Ex. 319.
145. *Browning v. War Office,* [1963] 1 Q.B. 750, C.A.
146. *Brunsden v. Humphrey,* 91884) 14 Q.B.D. 141, C.A.
147. *Buchanan v. Avdali*, 15 B. L.R. 276 : W.R. Suppl. Vol. III. p. 283.
148. *Buckland v. Farmer and Moody,* [1978] 3 All ER 929 : [1979] 1 WLR 221.
149. *Bulbaddar Singh v. Solamo*, 5 W.R. 107.
150. *Bulk Oil v. Sun International*. (1984) 1 Lloyd's Rep. 531.
151. *Bull v. Vazquez* [1947] I All E.R. 334, CA .. at 336-337.
152. *Bunclark v. Hertfordshire C.C.,* (1977) 234 E.G. 381 and 455.
153. *Burn v. Morris,* (1834) 2 Cr. & M. 579.
154. *Butterworth v. Butterworth of Eaglefield*, I.L.R. (1920) Pat. 126.
155. *C.B.I. Staff Co-op. Bldg. Socy. Ltd. v. D.R. Koteswara Rao,* AIR 2004 AP 18, para 39.
156. *Campbell Mostyn v. Barnett,* [1954] 1 Lloyd's Rep. 65, C.A.
157. *Canadian Pacific Co. v. Kelvin Shipping Co., (*1927) 138 L.T. 369, H.L.
158. *Canden-Nominees v. Fore,* (1940) 2 Ch. 352.
159. *Candler v. Christmas*, 91951) 1 All ER 426.
160. *Carapanayoti & Co. Ltd. v. E.T. Green Ltd.*, (1959) 1 QB 131 : (1958) 3 All ER 115.
161. *Carnes v. Nesbitt,* (1862) 7 H. & N. 778.
162. *Carvill v. Irish Industrial Bank Ltd.,* [1968] IR 325.
163. *Cassell & Co. Ltd. v. Broome,* (1972) 1 All E.R. 801 at pp. 829, 830, 838.
164. *Cellulose Acetate Silk Co. Ltd. v. Widnes Foundry Ltd.,* [1933] A.C. 20.
165. *Cellulose Acetate Silk Co. v. Widnes Foundry (1933]* A.C 20 at 26.
166. c*f Cato v. Cato* (1972) 116 *S.J.* 138.
167. *Cf Denmark Productions Ltd. v. Bosobel Productions Ltd.,* [1969] 1 QB 699 at 722.
168. *cf Robophone Facilities v. Blank* (1966] 1 W.L.R. 1428, CA, at 1449.
169. c*f Sparrow v. Paris* (11'62) 7 H. & N. 594 at 599.
170. *cf Widnes Foundry v. Cellulose Acetate Silk Co.,* [1931] 2 K.B. 393. C.A. at 405.
171. *Cf. British Racing Drivers' Club v. Hextall Erskine & Co.,* [1996] P.N.L.R. 523.

172. *Cf. British Transport Commission v. Gourley,* (1956) A.C. 185 at p.206: (1985) 3 All. E.R. 796 at p.804 (H.L.) per Lord Goddard.
173. *Cf. Compagnia Financiera "Soleada" v. Hamoor Tanker Corpn, The Borag,* [1981] 1 W.L.R. 274 C.A.
174. *Cf. Dodd Properties v. Canterbury City Council,* [1980] 1 W.L.R. 433.
175. *cf. Tucker v. Linger,* (1882) 21 Ch.D. 18; *cf. McAuley v. London Transport Executive,* [1957] 2 Lloyd's Rep. 500, C.A.
176. *Challaphroo v. Banga Behan Sen*. 31 I.C. 394.
177. *Chand Kuar v. Partap Singh,* I.L.R. 16 Cal. 98.
178. *Chandler v. Webster,* (1904) 1 KB 493.
179. *Chapel v. Hicks,* (1833) 2 Cr. 7 M. 214.
180. *Chaplin v. Hicks*, (1911) 2 K.B. 786.
181. *Chapman v. Ellesmere,.* (1932) 2 K.B. 431, C.A.; at 471-472.
182. *Charter v. Sullivan,* [1957] 2 QB 117 : [1957] 1 All ER 809 : [1957] 2 WLR 528.
183. *Charter-house Credit v. Tolley* (1963) 2 Q.B. 683, 711.
184. *Chasteby v. Auckland,* (1897) App. Cas. 155.
185. *Chenna Basappa v. Sree Sankara Bharatiswami,* AIR 1929 Mad. 493 at p. 495.
186. *China National Foreign Trade Transportation Corpn v. Eulogia Shipping Co SA of Panama, the Mihalis Xilas,* [1979] 2 All ER 1044 : [1979] 1 WLR 1018.
187. *Christy v. Row* (1808) 1 Taunt 300.
188. *Chunilal V Mehta v Century Spinning and Mfg Co Ltd.,* AIR 1962 SC 1314, p. 1319 : [1962] 3 Supp. SCR 549.
189. *Chunilal v. Kripashankar, 8* Bom. L.R. 838.
190. *Clark v. Newsam,* (1847) 1 Ex. 131 at 141.
191. *Clayton-Greene v. de Courville,* 91920) 36 T.L.R. 790.
192. *Clea Shipping Corporation v. Bulk Oil International Ltd.* (The Alaskan Trader), (1984) 1 All ER 129.
193. *Clifton v. Hooper,* (1844) 6 Q.B. 468.
194. *Clippens Oil Co. v. Edinburgh and District Water Trustees,* [1907] A.C. 291 at 303.
195. *Clomien Fuiel Econmiser Co. Ltd. v. National School of Salesmanship Ltd.,* 60 R.P.C. 209 (C.A.).
196. *Clyde Bank Engineering and Shipbuilding Co v Castaneda;* [1905] AC 6, [1904-07] All ER Rep 251.
197. *Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda* [J 905J A.c. 6 at 10.
198. *Cohen v. Cassim Nana,* I.L.R. 1 Cal. 264.
199. *Coles v. Sims* (1854) 5 De G. M. & G. I.
200. *Columbia Picture Industries v. Robinson,* (1987) Ch. 38.
201. *Columbus Co. v. Clowes ,* (1903) 1 K.B. 244.
202. *Commissioners for the Port of Rangoon v. Moola Dawood,* 9 I.C. 470.
203. *Compania Financiera "Soleada" v. Hamoor Tanker Corpn, The Borag,* [1981] 1 W.L.R. 274, C.A.

204. *Constantine v. Imperial London Hotels Ltd.,* (1944) 2 All. E.R. 171 (Q.B.D.)
205. *Continental Construction Co. Ltd. v. State of Madhya Pradesh,* (1988) 3 SCC 82 : AIR 1988 SC 1166.
206. *Contra Maheshwari Metals and Metals Refinery v. Tamil Nadu Small Industries Corporation Limited.* (1982) 1 M.L.J. 35 at pp. 48, 49.
207. *Coorla Spinning and Weaving Mills Co. Ltd. v. Vallabhadas kalianji,* AIR 1925 Bom. 547 at p. 558.
208. *Cory v. Thames Ironworks & S.S. Co.,* (1868) L.R. 3 Q.B. 181.
209. *Court Line Ltd. v. Dant & Russell Inc.* (1939) 3 All. E.R. 314, 318.
210. *Courtney and Fairbarn Ltd. v. Tolaini Bros (Hotels) Ltd.,* (1975) 1 All ER 716.
211. *Cox v. Philips Industries Ltd.,* [1976] 3 All ER 161 : [1976] ICR 138.
212. *Crisdee v. Bolton* (1827) 3 C & P. 240 at 243.
213. *Croffer Handwoven Harris Tweed Co. Ltd. v. Veitch,* (1962) 1 All. E.R. 148.
214. *Cunliffe v. Harrison,* (1851) 6 Exch 903.
215. *Cunningham v. Harrison,* [1973] Q.B. 942, C.A.
216. *Cutter v. Powell,* (1795) 6 Term Rep 310.
217. *Cyril Leonards & Co. v. Simo Securities Trust Ltd.,* [1971] 3 All ER 1313 : [1972] 1 WLR 80.
218. *Czarnikow v. Koufos,* (1969) 1 A.C. 350.
219. *D. C. Thompson & Co. Ltd. v. Deakin,* ((1952) 2 All.E.R. 361 at p. 370.
220. *D.R. Mehta v. Tin Plate Dealers Association Ltd.,* AIR 1965 Mad 400.
221. *Dada v. Babaji,* 2 Bom. H.C.R. 36 at p. 38.
222. *Dadabhoy v. Pestonji,* I.L.R. 17 Born.
223. *Dahl v. Nelson, Donkin and Co.*, (1881) 6 AC 38.
224. *Danwin Productions Ltd. v. EMI Films Ltd.,* (1984) Times 9 March.
225. *Darbishire v. Warran,* [1963] 1 W.L.r. 1067, C.A.
226. *Datubhai Ibrahim v. Abubakar Molidina*, I.L.R. 12 Born. 242 at p. 245.
227. *Davidson v. Gwynne,* (1810) 12 East 381 at 389.
228. *Davies v. Penton* (1827) 6 B. & C 216 at 224.
229. *Davis Contractor Ltd. v. Fareham U.D.C.*, 1956 AC 696.
230. *Davis v. Oswell*, (1837) 7 C.& P. 804 (conversion).
231. *De Francesco v. Barnum,* (1890) 45 Ch.D. 430.
232. *De Vaux v. Salvador,* 43 R.R. 474 : 4 Ad. & El. 420.
233. *Debendranath v. Odit Churn,* I.L.R. 3 Cal. 390.
234. *Decro-Wall International SA v. Practitioners in Marketing Ltd.,* [1971] 2 All ER 216 at 227 : [1971] 1 WLR 361 at 374.
235. *Deeny v. Goods Walker (No. 3),* [1995] 1 W.L.R. 1206; [1995] 4 All ER 289; [1996] L.R.L.R. 168.

236. *Denmark Productions ltd. v. Boscobel Productions Ltd.,* [1969] 1 QB 699 at 731 : [1968] 3 All ER 513 at 527.
237. *Dennis v. L.P.T.B.,* [1948] 1 All ER 779.
238. *Denny, Motl & Dickson v. Fraser (James B.) & Co. Ltd* [1944] A.C. 265).
239. *Deno Nath v. Nibaran*, I.L.R. 27 Cal. 423.
240. *Devendra Singh v. State*, AIR 1987 All 306.
241. *Dhanrajgirji v. Tata & Sons,* AIR 1924 Bom. 473.
242. *Dhruv Dev v. Harmohinder Singh,* AIR 1968 SC 1024.
243. *Diamond v. Campbell Jones,* (1960) 1 All ER 583.
244. *Diestal v Stevenson* [1906] 2 KB 345.
245. *Dingle v. Associated Newspapers,* (1964) A.C. 371.
246. *Dip Chand v. Manak Chand,* AIR 1959 Nag. 154 at pp. 155-156.
247. *Dixam v. Deveridge,* (1852) 2 C. & P. 109 N.P.
248. *Dodd Properties v. Canterbury City Council,* [1980] 1 W.L.R. 433, C.A.
249. *Dominion Mosaics and Tile Co. v. Trafalgar Trucking Co.,* [1990] 2 All ER 246, C.A.
250. *Dominion of India v. All India Reporter Ltd.,* AIR 1952 Nag 32.
251. *Doyle v. Olby Ltd.*; (1969) 2 All. E.R. 119.
252. *Drane v. Evangeloll,* (1978) 1 W.L.R. 455, C.A.
253. *Draviyam Pillai v. Cruz Fernandez,* 31 I.C. 322.
254. *Dunkirk Colliery Co. v. Lever,* (1878) 9 Ch.D. 20, C.A.
255. *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.* [1915] A.C. 79.
256. *Dutubhai Ibrahim v. Abubaker Molidina,* I.L.R. 12 Born. 242 at p. 246.
257. *Dwarika v. Bhagawati,* AIR 1939 Rang. 413 at p. 416.
258. *E.A. Gubray v. Ramjusory Golabroy,* AIR 1921 Cal 305.
259. *Edmondson v. Nuttall,* (1864) 17 C.B. (N.S.) 280.
260. *Edward Wilson v. Kanhaya Sahoo,* 11 W.R. 143 at p. 144.
261. *Edwards v. Society of Graphical & Allied Trades,* [1970] 1 W.I.R. 379.
262. *Elliott Steam Tug Co. v. Shipping Controller,* [1922] 1 K.B. 127, C.A.
263. *Ellis Gray Mill. Co. v. Sheppard*, 222 S.W.2d 742, 747, 359 Mo. 505
264. *Elphinstone v Monkland Iron and Coal Co Ltd* (1886) II App Cas 332, p 342.
265. *Emeh v. Kensington Area Health Authority,* [1985] Q.B. 1012, C.A.
266. *Emray v. Owen,* (1850) 6 Exch. 353.
267. *English Hop Growers v. Dering* [1928] 2 K.B. 174. CA .. at 181.
268. *Erie County Natural Gas Co. v. Carroll,* [1911] A.C. 105, P.C.
269. *Esso Petroleum Co. v. Mardon,* [1976] Q.B. 801, C.A.
270. *Evans Marshall & Co. v. Bertola S.A. and Independent Sherry Importers,* [1976] 2 Lloyd's Rep. 17, H.L.

271. *Evans v. Yakina Valley Grape Growers Association,* 108 P 2d 671 at 683 (1988).
272. *Everard v. Hopkins,* 2 Bulst 332.
273. *Exchange Telegraph Co. v. Gregory & Co.* (1896) 1 Q.B. 147 : 65 L.J.Q.B. 262.
274. *Export Credits Guarantee Department v. Universal Oil Products Co.,* (1983) 1 W.L.R. 399, H.L.
275. *F.A. Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.,* (1916) 2 AC 397.
276. *Fardon v. Harcourt Rivington,* (1932) 146 L.T. 391.
277. *Fateh Ali v. Muhammad Bakhsh,* AIR 1928 Lah. 516 at p. 523.
278. *Fateh Chand v. Bal Kishan Dass,* AIR 1963 SC 1405.
279. *Fazlic v. Milingimbi Community Inc.,* (1982) 38 A.L.R. 424.
280. *Feize v. Thompson,* (1808) 1 Taunt 121.
281. *Fenning Film Service Ltd. v. Wolverhampton Walsall and District Cinemas,* (1914) 3 K.B. 1171 : 83 L.J.Q.B.. 1860.
282. *Fernandez v. Gonsalves,* AIR 1925 Bom. 97: I.L.R. 48 Bom. 673.
283. *Fibrosa Spolka Akcyina v. Fairbairn Lawson Combe Barbour Ltd.*, (1943) AC 32.
284. *Fifth Ave. v. Taiyo Trading Co.*, 73 N.Y.S.2d 774, 776, 190 Misc. 123.
285. *Finelli v. Dec,* (1986) DLr (2d.) 393 (ont. CA) Cf
286. *Finlay v. Kwik Hoo Tong,* [1929] 1 K.B. 400, C.A.
287. *Firm Bachhraj Amolakchand v. Firm Nandlal Sitaram,* AIR 1966 MP 145,
288. *Firm Rampratap v. S.S. Works Ltd.,* AIR 1964 Pat 250. ILR 1952(2) Cal 458., AIR 1923 PC 54(2) and AIR 1941 Pat 429.
289. *First v. Knight,* (1872 LR 7 Exch 111 at 112.
290. *Fisher v. Prince,* 91762) 3 Bur. 1363.
291. *Fletcher v. Tayleur* (1855) 17 C.B. 21.
292. *Flurean v. Thornhill,* (1776) 2 Wm. Bl. 1078.
293. *Ford Motor Co. v. Armstrong,* (1915) 31 T.L.R. 267, C.A.
294. *Forsikringsaktieselskapet Vesta v. Butcher (No. 1),* [1989] A.C. 852; [1989] 2 W.L.R. 290; (1989) 133 S.J. 184; [1989] 1 All ER 402; 1989 Fin.L.R. 223; [1989] 1 Lloyd's Rep. 331; (1988) 4 Const. L.J. 75, H.L.
295. *Fowler v. Zamming,* (1959) 1 All. E.R. 290 : (1959) 2 W.L.R. 241.
296. *Foxall v. Barnett,* 95 R.R. 906 : 2 El. & Bl. 928.
297. *Frante v. Gaudet,* (1872) L.R. 6 Q.B. 199.
298. *Frederick Thomas Kingsley v. Secretary of State*, AIR 1923 Cal. 49 at p. 50.
299. *French Marine v. Compagine Napolitaine D'Eclairage, etc.* [1921]2 A.C. 494.
300. *Frost v. Knight,* (1872) LR 7 Exch 111.
301. *Fulchand v. Pularam,* 1963 M.P. L.J. (Notes) 84.

302. *Futeek Parooee v. Mohender Nath,* I.L.R. 1 Cal. 385 : 25 W.R. 226.
303. *Fyffes Group Ltd. v. Reefer Express Lines Pty Ltd.;* (1996) 2 Lloyd's Rep. 171.
304. *G. A. Galia Kotwala and Co. Ltd. v. K.R.L. Narasimhan and Brothers*
305. *G.C. Sett v. Madhoram,* AIR 1917 Cal 411.
306. *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.* (1926) 42 T.L.R. 376.
307. *Gaekwad of Baroda v. G.I.O. Rly.,* 27 Bom. 344.
308. *Gainsford v. Carroll,* 91824) 2 B. & C. 624.
309. *Galoo v. Bright Grahame Murray,* [1994] 1 W.L.R. 1360; [1994] 1 All ER 16; [1994] B.C.C. 319
310. *Galsworthy v. Strutt,* (1848) 1 Ex. 659 : 17 L.J. Ex 226.
311. *Ganga Saran v. Firm Ram Charan Ram Gopal*, AIR 1952 SC 9.
312. *Ganga Singh v. Santosh Kumar,* AIR 1963 All 201.
313. *Gangadhar Rao Madhorao Chitnavis v. Parashram,* AIR 1928 Nag. 120 at p. 122.
314. *Gangiah v. Gangadharan,* AIR Mys. 170 at p. 181.
315. *Gardner v. Marsh and Parsons,* [1997] 1 W.L.R. 489, C.A.
316. *Garnac Grain Co. v. Faure & Fairclough,* [1968] A.C. 1130.
317. *Geddis v. Bann Reservoir,* (1978) 3 A.C. 430.
318. *Gedehal Karibashavana Gowda v. Nandavaram Veerabhadrappa,* I.L.R. 36 Mad. 580 : 16 I.C. 14 : 25 M.L.J. 3.
319. *Gee v. Lancashire and Yorkshire Rly. Co.,* (1860) 6 H & N. 211.
320. *General Accident Assurance Co. v. Noel,* (1902) 1 K.B. 377.
321. *General Aniline & Film Corp. v. Bayer Co.*, 64 N.Y.S.2d 492, 501, 188 Misc.929.
322. *General Bill Posting Co. ltd. v. Atkinson,* [1909] AC 118.
323. *George Baker Transport Ltd. v. Eynon,* (1974) 1 WLR 462.
324. *Gerrard v. Clowes* [1892] 2 Q.B. 11.
325. *Ghulam Haidar v. Iqbal Nath,* AIR 1939 Lah. 118 at p. 122.
326. *Girija Prasad v. National Coal Co.,* AIR 1949 Cal. 472 at pp. 476, 477.
327. *Girwarsingh v. Siramansingh,* I.L.R. 32 Cal. 1060.
328. *Glasgow Corporation v. Muir,* 91943) A.C. 448 at p. 457.
329. *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce*, [1997] 4 All ER 514 : Carter 14 JCL 239.
330. *Glidden Co. v. Hellenic Lines Limited, CA'ny 275 F.* 2d 253, 255.
331. *Gobbons v. South West Water Services* [1993] 2 W.L.R. 507; [1993] 1 All ER 609.

332. *Goffin v. Houlder,* (1921) 50 L.J. Ch. 488.
333. *Goodwin v. Francis,* (1970) L.R. 56 P. 296.
334. *Gopaldas Jethmal v Municipality Hyderabad*; AIR 1949 Sind 1.
335. *Govind Chandra Sambarsingh v. Mahapatra Upendra Singh*, AIR 1960 Orissa 29: 25 Cut. L.J. 360.
336. *Govindaswami Chettiar v. palaniappa Chettiar,* 48 M.L.J. 397.
337. *Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai,* (1977) 3 SCC 179 : AIR 1977 SC 1019.
338. *Grant v. Australian Knitting Mills,* AIR 1936 P.C. 34 at pp. 41-42.
339. *Grasseman v. Littlepage,* 3 W.r. (Refer Reedr. Moulmein) 1.
340. *Gray v. Pearson,* (1970) 5 C.P. 568.
341. *Greek Catholic Congregation of Borough of Olyphant v. Plummer*, 12 A.2d 435, 439, 338 Pa. 373, 127 A.L.R. 1008.
342. *Green v. Price* (1845) 13 M. & W. 695 at 701.
343. *Greenlands Ltd. v. Willmshurst and London Association,* (1933) 3 K.B. 507 at p. 532.
344. *Greenlands v. Wilmshurst (1913)* 3 K.B. 507, *C.A* .. at 532.
345. *Growers v. Dering,* (1928) 2 K.B. 174, C.A. at 182.
346. *Gujarat Housing Board v. Vikul Corporation;* AIR 2004 Guj. 319.
347. *Gundayya v. Subayya,* AIR 1927 Mad 89.
348. *Guppy (Bridport) v. Brookling and James,* (1983) 1 H.L.R. 1, C.A.
349. *Gurdit Singh v. Secy. of State,* AIR 1931 Lah 347.
350. *Gurunarayanan v. Sheolal Singh,* I.L.R. 46 Cal. 566 : 49 I.C. 1.
351. *H Dakin & Co Ltd. v. Lee* [1916] 1 KB 566.
352. *H. Mackintosh v. Complainant Crow*, (1883) ILR 9 Cal 689.
353. *H.L. Motorworks v. Alwahbi,* [1977] R.T.R. 276, C.A.
354. *H.R. & K. Industries v. State of Rajasthan,* AIR 1964 Raj 205.
355. *H.S. Gambhir v. Vam Dev Sharda,* (1991) 1 A.C.C. 162 at p. 163 (P. & H.)
356. *Habibullah v. G.M. Distilleries,* AIR 1956 AP 190.
357. *Hadley v. Baxendale,* (1854) 9 Exch, 341.
358. *Hadley v. Clarks,* (1799) STR 259.
359. *Hadupani Sabato v. Ganta Ratnam*; (1981) C.L.T. 87 at pp. 89. 97.
360. *Hale v. Ruthven,* (1869) 20 T.L.R. 404.
361. *Hall v. Barclay,* [1973] 3 All ER 620, C.A.
362. *Hall v. Pim,* (1928) 33 Com.Cas. 324, H.L.
363. *Hamlin v. Great Northern Rly. Co.,* (1856) 1 H. & N. 408.
364. *Hammond v. Bussey,* (1887) 20 Q. B.D. 79.
365. *Hanson v. Wearmouth Coal Co.,* (1939) 2 All. E.R. 47 at p. 54.
366. *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.,* [1970] 1 QB 447 at 464-465 : [1970] 1 All ER 225 at 233.

367. *Hari Chand Madan Gopal. V. State of Punjab,* AIR 1973 SC 381.
368. *Hari Singh v. Dewani Vidyawati,* AIR 1960 J & K 91.
369. *Harlow and Jones v. Panex (International),* [1967] 2 Lloyd's Rep. 509.
370. *Harlow and Jones v. Panex (International),* [1967] 2 Lloyd's Rep. 509.
371. *Harrison v. Wright* (1811) 13 East 343.
372. *Harrop v. Hurst*, (1968) L.R. 4 Exch. 43.
373. *Haviland v. Long,* [1952] 2 Q.B. 80, C.A.
374. *Hayes v. James & Charles Dodd,* [1990] 2 All ER 815, C.A.
375. *Health Authority v. South Staffordshire Waterworks Co.,* (1978) 2 All ER 769 : (1978) 1 WLR 1387.
376. *Heaven & Kesterton v. Etablissements Francois Albiac,* [1956] 2 Lloyd's Reo. 316.
377. *Henjes Marine, Inc. v. White Const. Co.*, 58 N.Y.S.2d. 384, 387.
378. *Herert Clayton and Jack Waller Ltd. v. Oliver*, [1930] AC 209 : [1930] All ER Rep. 414.
379. *Herji Mulji v. Cheong Co. Yue Steamship Co.* [1926] A.C. 497.
380. *Hermanand Mohatta v. Asiatic S.N. Co.,* AIR 1941 Sind 146 at p. 150.
381. *Herne Bay Steam Boat Co. v. Hutton,* (1903) 2 KB 683.
382. *Heron II, the Koufos v. C. Czarnikow Ltd.* (1969) 1 AC 350: (1967) 3 All E.R. 686, HL.
383. *Heskell v. Continental Express* (1950) 1 All E.R. 1033.
384. *Hewood v. Wellers* [1976] QB 446 : [1976] 1 All ER 300.
385. *Heyman v. Darwins Ltd* [1942] A.C. 356, at p. 363).
386. *Heywood v. Wellers,* [1976] QB 446 : [1976] 1 All ER 300.
387. *Hill v. Showell,* (1918) 87 L.J.K.B. 1106, H.L.
388. *Hinton v. Sparkes,* (1868) L.R. 3 C.P. 161 : 37 L.J.C.P. 81 : *Lea v. Whitaker,* (1872) L.R. 8 C.P. 70 : 27 L.T. 676.
389. *Hiort v. London and North Western Rly. Co.,* (1879) 4 Exch. D. 188.
390. *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.,* (1926) AC 497.
391. *Hivac Ltd. v. Park Royal Scientific Instruments Ltd.,* (1946) CH 169.
392. *Hobbs v. London South Western Rly. Co.,* (1875) L.R. 10 QB.
393. *Hochster v. De la Tour, (1853) 2 E & B 678.*
394. *Hoenig v Isaacs*, [1952] 2 All ER 176.
395. *Holden v. Chief Constable of Lancashire,* (1987) Q.B. 380, C.A.
396. *Holt v. Ward,* (1732) 93 E.R. 954.
397. *Home v. Midland Railway Company,* (1873) L.R. 8 C.P. 131.
398. *Homer v. Flintoff,* (1842) 9M. & W. 678: 11 L.J. Ex. 270.

399. *Homsy v. Murphy* (1997) 73 P. & C.R. 26.
400. *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. (1962)* 2 QB 26 : (1962) 1 All ER 474.
401. *Hope Prudhomme & Co. v. Hamel & Harvey,* I.L.R. 49 Mad. 1.
402. *Horlock v. Beal* [1916] 1 A.C. 486.
403. *Horne* v. *Midland Railway Company,* (1873) L.R. 8 C.P. 131.
404. *Horne v. Midland Ry.* (1873) L.R. 8 C.P. 131.
405. *Houndsditch Warehouse Co. v. Waltex,* [1944] K.B. 579.
406. *Hounslow London Borough Council v. Twickenham Garden Developments,* [1971] Ch. 233.
407. *Howard v. Woodward* (1864) 34 L.J.Ch. 47.
408. *Huckle v. Money,* (1763) 2 Wils. K.B. 205.
409. *Hunt v. Severs,* [1994] 2 A.C. 350.
410. *Huranandrai Fulchand v. Pragdar Budhsen, AIR 1923 PC 54.*
411. *Hussey v. Eels,* [1990] 2 Q.B. 227, C.A.
412. *Hydraulic Engineering Co. v. McHaffie,* (1878) 84 Q.B.D. 670.
413. *Hyundai Heavy Industries Co. Ltd. v. Papadopoulos,* [1980] 2 All ER 29 : [1980] 1 WLR 1129.
414. *Imperial Tobacco Co (of Great Britain and Ireland) Ltd v Parslay* [1936] 2 All ER 515, P 519.
415. *Imperial Tobacco Co. v. Parslay*; (1936) 2 All E.R. 515, C.A.
416. *Inchbald v. Western Neilgherry Coffee Plantation,* (1864) 34 L.J. C.P. 15.
417. *Inderwick v. Leech,* (1885) 1 T.L.R. 484.
418. *Ingram v. Lawson,* 54 R.R. 766 (6 Bing. N.C. 212).
419. *Interoffice Telephones v. Freeman,* [1958] 1 Q.B. 190, C.A.
420. *Islamic Republic of Iran S.S. Lines v. Ierax S.S. Co. of Panama* (1991) 1 Lloyd's Rep. 81.
421. *Ismail Sait & Sons v. Wilson & Co.*, AIR 1919 Mad. 1053 (D.B.).
422. *Iswaram Pillai v. Taragan,* 23 I.C. 951 at P. 956 : I.L.R. 38 Mad. 753.
423. *Italmare Shipping Co. v. Ocean Tanker Co. Inc.* (No. 2), [1982] 3 All ER 273.
424. *J.C. Galstaun v. Dunia Lal Seal*, 9 C.W. N. 612.
425. *Jackson v. Horixon Holidays Ltd.,* [1975] 3 All ER 92 : [1975] 1 WLR 1468.
426. *Jackson v. Union Marine Insurance Co. Ltd.*, (1874) LR 10 CP 123.
427. *Jagatjit Distilling and Allied Industries v. Bharat Nidhi Ltd.* ILR 1978 I Delhi 526.
428. *Jamal v. Moola Dawood & Sons Co.,* 31 I.C. 949 : I.L.R. 43 Cal. 493.
429. *James Scott & Sons Ltd. v. Del Sel*, 1922 AC 592.
430. *Jaques v. Millar,* (1877) 6 Ch D 153.
431. *Jarvis v. Swans Tours Ltd.* [1973] QB 233 : [1973] 1 All E.R. 71.

432. *Jayes v. James and Charles Dodd (a firm)*, [1990] 2 All ER 815, [1988] BTLC 380.
433. *Jebsen v. East and West Indian Dock Co.,* (1875) L.R. 10 C.P. 300.
434. *Jewelowski v. Propp,* [1944] K.B. 510.
435. *Jibunti v. Shibnath,* I.L.R. 8 Cal. 819.
436. *Jobson v. Johnson* [1989] 1 W.L.R. 1026, CA.
437. *John v. MGN,* (1996) 2 All E.R. 35, C.A.
438. *Johnson v. Atkins*, 127 P.2d 1027, 1028, 1029, 1030, 53 Cal.App.2d. 430
439. *Johnson v. Unisys Ltd.,* [2001] 2 All ER 801.
440. *Johnstone v. Milling,* (1886) 16 QBD 460.
441. *Johson v. Agnew,* [1980] AC 367 : [1979] 1 All ER 883.
442. *Jones v. Barclay Bank,* (1949) W.N. 196 (C.A.).
443. *Jones v. Boyce,* (1816) 1 Stark. 493.
444. *Jones v. Gooday,* 58 R.R. 649 (8 M. & W. 146).
445. *Jones v. Heavens* (1877) 4 Ch.D. 636.
446. *Jones v. Just*,(1868) L.R. 3 Q.B. 197.
447. *Jones v. Watney, Combe, Reid & Co.,* (1912) 28 T.L.R. 399.
448. *Joseph Constantine Steam Line Ltd v. Imperial Smelting Corporation ltd* [1942] A.C. 154, at p. 163.
449. *Joyner v. Weeks,* [1891] 2 Q.B. 31, C.A.
450. *Jugul Kishore Marwari v. Babu Homeshwar Singh,* AIR 1922 Pat. 79 at p. 84.
451. *Kadappa Mudaliar v. Muthuswami Ayyar*, (1926) 50 Mad 94 : AIR 1927 Mad 99.
452. *Kadar Baksh v. Ram Nag,* 47 W.R. 48.
453. *Kaines v. Osterreichische Warrenhandelsgesellschaft,* [1993] 2 Lloyd's Rep. 1 C.A.
454. *Kalai Haidar v. Shaik Kyamuddi,* 23 W.R. 417.
455. *Kali Kisen Tagore v. Jadoo Lalmullick*, 5 C.L.R. 97 at p. 101.
456. *Kaliappa Gaundan v. Vayapuri Gaundan,* 2 M.H.C.R. 442.
457. *Kalyani Spinning Mills Ltd. v. Sudha Shashikant Shroff*, AIR 1995 Cal. 48, 61, para 29
458. *Kamala Ram v. Kanza Khan,* 1812 P.R. 41.
459. *Kanak Kumar! v. Chandan La!*, AIR 1955 Pat. 215 at p. 222.
460. *Kapadganj Municipality v. Ochhavlal,* AIR 1928 Bom. 329 at p. 332.
461. *Karl Ettlinger & Co. v. Chagandas & Co.,* AIR 1915 Bom 232.
462. *Kashler & Cohen v. Slavouski,* (1928) 1 K.B. 78.
463. *Kasturibai v. G.I.P. Rly. Co.,* AIR 1923 Bom. 172.
464. *Keen v. Priest,* (1859) 4 H.& N. 236.
465. *Kelly v. Partington,* 5 B. & Ad. 651.
466. *Kelly v. Sherlock*, (1866) 7 B. & S. 480.
467. *Kemble v Farren* , (1829) 6 Bing. 141 : (1824-34) All E.R. .Rep 641.
468. *Kemp* v. *Intasun Holidays Ltd.,* (1987) 2 F.T. L.R. 234.

469. *Kesari Chand v. Governor-General in Council*, ILR (1949) Nag 718 (C).
470. *Keshob Lal Nag v. Jhanendra Nath,* 24 I.C. 538.
471. *Kettle v. Hunt,* Bull N.P. 77.
472. *Khaji Sayyad Hussain v. Ediga Narasimhappa,* 16 I.C. 962: 23 M.L.J. 539.
473. *Kherode Behari Gossami v. Narendralal Khan,* 55 I.C. 310.
474. *Khurshid Hussain v. Secretary of State*, A.I.R. 1937 Pat. 302.
475. *Knuppfer v. London Express Newspaper* (1943) K.B. 80. CA., at 91.
476. *Kodros Shipping Corpn. v. Empresa Cubana de Fletes,* the Evia (1982) 3 All ER 350.
477. *Koer' Sen v. Sukho,* 27 I.C. 503 : 13 A.L.J. 6.
478. *Kollsman v. Detzel*, 55 N.Y.S.2d 491, 492, 184 Misc. 1048.
479. *Koomaree Dasee v. Bama Sundari Dasee,* 10 W.R. 202.
480. *Koufos v. C Czarnikov Ltd.,* (1969) 1 A.C. 350.
481. *Koufos* v. C. *Czarnikow Ltd.,* (1969) 1 A.C. 350.
482. *KP Subbarmna Sastri v. K.S. Raghvan,* AIR 1987 SC 1257.
483. *KP. Ambady v. K.M. Balan,* AIR 1959 Ker. 273 at pp. 274. 275; 1958 Ker. L.T. 801.
484. *Krell v. Henry)*, (1903) 2 KB 740
485. *Krishun Das v. Ganesh Ram,* AIR 1950 Pat. 481 at pp. 482, 483.
486. *Kumud Kanta Chakraburthy v. E. Bignold , Manager Court of Wards,* AIR 1923 Cal. 306.
487. *Kunjilal v. Durga Prasad,* AIR 1920 Cal 1021.
488. *L. N. Jackson & Co. v. Lorentzen*, D.C.N.Y., 83 F.Supp. 486, 490.
489. *L.A. Subramania Iyer v. R.H. Hitchock,* A.I.R. 1925 Mad. 950 at p.955.
490. *Lachhman Das v. Bhoja Ram*, AIR 1925 Lah. 284 at p. 286.
491. *Lakshman Chetty v. Subrahmanya Chetty,* 501 I.C. 69.
492. *Lakshmi Narain v. Verno,* 5 P.I.R. 1907 : 137 P.R. 1906.
493. *Lalbhai Dalpatbhai and Co., M/S v. Chittranjan Chandulal Pandya,* AIR 1966 Gujarat 189.
494. *Landom v. Hurrell* [1955] 1 All E.R. 839.
495. *Lane v. Holloway,* (1968) 1 Q.B. 379, C.A., at 391.
496. *Lardsvale Finance Plc v. Bank of Zambia*, (1996) Q.B. 572.
497. *Larrinaga & Co. v. Societe Franco-Americaine* des Phosphates de Medulla (1923) 92 LJKB 455.
498. *Larrinaga v. Societe Franco – Americaine,* (1923) 39 TLR 316 : 92 LJ KB 455.
499. *Law v. Redditch Local Board,* (1892) 1 Q.B. 127: 61 L.J.Q.B. 172.
500. *Le Lievre v. Gould,* (1893) 1 Q.B. 49 at p. 50.
501. *Lebeaupin v. Crispin*, (1920) 2 KB 714.
502. *Leigh v. Paterson,* (1818) 8 Taunt. 540.

503. *Lekh Singh v. Dwarka Nath,* AIR 1929 Lah. 249 at p. 252.
504. *Lesters Leather and Skin Co. v. Home and Overseas Brokers,* (1948) 64 T.L.R. 569, C.A.
505. *Levy v. Langridge,* 46 R.R. 689 (4 M. & W. 337).
506. *Ley v. Hamilton* (1935) 153 L.T. 384.
507. *Liesbosch Dredger v. S.S. Edison,* [1933] A.C. 449.
508. *Liffen v. Watson,* [1940] 1 K.B. 556, C.A.
509. *Livingstone v. Rawyards Coal Co.,* (1880) 5 A.C. 25.
510. *Lloyds and Scottish Finance v. Modern Cars and Caravans (Kingston),* [1966] 1 Q.B. 764.
511. *Lloyds Bank v. Chartered Bank,*[1929] 1 K.B. 40, C.A.
512. *London and North-Western Rly. Co. v. Lancashire and Yorkshire Rly. Co.,* (1876) L.R. 4 Exch. 174.
513. *London and South of England building Society v. Stone,* [1983] 1 W.L.R. 1242.
514. *London building Society v. Stone,* [1983] 1 W.L.R. 1242, C.A.
515. *London Graving Dock Co. Ltd. v. Harton,* (1951) 2 All. E.R. 1 at p. 29 : (19510 A.C. 737.
516. *Loudon v. Ryder,* (1953) 2 Q.B. 202, C.A. at 207 (assault).
517. *Lovelock v. Franklyn,* (1846) 8 QB 371.
518. *Lowe v. Peers,* (1768) 4 Bur. 2225.
519. *Lumley v. Gye,* (1853) 2 E.&B. 216.
520. *Luna Park (NSW) Ltd. v. Tramuways Advertising Proprietary Ltd.,* (1938) 61 CLR 286, p. 301.
521. *M. Preston v. J.S. Humphreys,* AIR 1955 Cal. 315 at pp. 315. 316. 318; (1954) Cr. L.J. 178.
522. *M/s. Alopi Parshad and Sons Ltd. v. Union of India* AIR 1960 SC 588.
523. *M/s. Basanti Bastralaya v. River Steam Navigation Co. Ltd.,* AIR 1987 Cal 271.
524. *M/s. D. Gobindram v. M/s. Shamji K. & Co.,* AIR 1961 SC 1285.
525. *M/s. Murlidhar v. M/s. Harish Chandra,* AIR 1962 SC 366.
526. *M/s. Shanti Vijay & Co. v. Princess Fatima Fouzia,* AIR 1980 SC 17.
527. *Ma Hnin Yi v. Chew Whee Shein,* AIR 1925 Rang. 261 at p. 262.
528. *Machaima v. Usman Beari,* 17 M.L.J. 78.
529. *Mackintosh v. Crow,* I.L.R. 9 Cal. 692.
530. *Madan Mohan Dass v. Gokul Dass,* 10 M.I.A. 563.
531. *Madhav Shivram v. Rakma Bhaushet,* 9 Bom. L.R. 864.
532. *Madras Rly Co. v. Govinda Rao,* I.L.R. 21 Mad. 172.
533. *Madras Rly. Co. v. Zamindar of Carvetnagar,* 22 W.R. 279 (P.C.).
534. *Mafo v. Adams,* (1970) 1 Q.B. 548, C.A. at 558.
535. *Magee v. Lavell* (1874) L.R. 9 C.P. 107 at 115.
536. *Mahadeo Baksh Singh v. Sant Baksh,* AIR 1920 Oudh 180.

537. *Mahadeo Prasad v. Siemens (India) Ltd* , AIR 1934 Cal. 285 at p. 287.
538. *Mahadeo Prosad v. Calcutta D. & Co.,* AIR 1961 Cal 70.
539. *Maharashtra State Electricity v. Sterilite Industries (India),* (2001) 8 SCC 482.
540. *Malik v. Bank of Credit and Commerce Internation,* [1997] 3 All ER 1.
541. *Mallozi v. Carpelli,* (1976) 1 LL LR 407.
542. *Malo v. Adams* [1970] 1 O.B. 548, C.A,
543. *Manaklal Bhagchand Sahu v. Bhagwandas Hiralal Chaurasia*, 1968 M.P.L.J. 806 at pp. 807-808.
544. *Manjamma v. Sattiraju,* 31 M.L.J. 816.
545. *Manubens v. Leon,* (1919) 1 KB 208.
546. *Marbe v. George Edwards (Daly's Theatre) Ltd.,* [1928] 1 KB 269 : [1927] All ER Rep 253.
547. *Marcroft v. Scruttons,* [1954] 1 Lloyd's Rep. 395, C.A.
548. *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corpn of Liberia, The laconia,* [1977] Ac 850 : [1977] 1 All ER 545.
549. *Maritime National Fish Ltd. v. Ocean Traders Ltd.,* (1935) AC 524, 529.
550. *Marshal & Co. v. Naginchand,* AIR 1917 Bom 182.
551. *Martindale v. Duncan,* [1973] 1 W.R. 574, C.A.
552. *Marzetti v. Williams,* (1830) 1 B. & Ad. 415.
553. *Mattocks v. Mann,* [1993] R.T.R. 13; The Time, June 19, 1992, C.A.
554. *Maula Bux v. Union of India*, AIR 1970 S.C. 1955 at pp. 1958-1959.
555. *Maung Bya v. Maung Kyi Nyo,* AIR 1925 P.C. 236 at pp. 238, 239.
556. *Maung San Da v. Maung Chang Tha,* AIR 1930 Rang 130 at p. 131.
557. *Maya Shankar v. Hari Shankar,* I.L.R. 10 Bom. 661.
558. *Mayiam v. Norris* (1845) 14 L.J.C.P. 95.
559. *McAuley v. London Transport Executive,* [1957] 2 Lloyd's Rep. 500, C.A.
560. *McMillan v. SinKh* (1914) 17 H.L.R. 120. CA.
561. *Medway Co. v. Earl of Rommey,* (1861) 9 C.B. N.S. 575.
562. *Meherin v. Meherin*, 209 P.2d 36, 39, 93 Cal.App.2d 459.
563. *Melachrino v. Nickoll,* [1920] 1 K.B. 693.
564. *Meller v. Spateman,* (1651) 1 Saunders 346.
565. *Menetone v. Athawes,* (1764) 3 Burr 1592.
566. *Mersey Docks v. Gibbs,* (1864) L.R.J. H.L. 93.
567. *Mersey Steel and Iron Co. v. Naylor Benzon & Co.,* (1884) 9 App Cas 434.
568. *Metal Box v. Currys,* [1998] 1 W.L.R. 175; (1988) 132 S.J. 52; [1988] 1 All ER 341.

569. *Metallund Rohstoff A.G. v. Acli Metals (London),* (1984) 1 Lloyd's Rep. 598, C.A.
570. *Metelmann & Co. v. N.B.R. (London),* [1984] 1 Lloyd's Rep. 614, C.A.
571. *Metropolitan Water Board v. Dick Kerr & Co. Ltd.,* (1918) AC 119.
572. *Metthey v. Curling* [1922] 2 A.C. 180.
573. *Meyappa Chetty v. Nanchamma Achi,* AIR 1929 Mad. 783 at p. 784.
574. *Michael v. Hart & Co.,* (1902)) 1 K.B. 482.
575. *Miehel Habib v. Sheikh Suleiman El Taji El FarouquL,* AIR 1941 P.C. 101.
576. *Minchburn v. Peck,* (1988) 20 H.L.R. 392, C.A.
577. *Mir Hazar Khan v. Sawan Ali,* 1910 P.R. 81.
578. *Moghul Steamship Co. v. Mc Gregor,* (1892) A.C. 25.
579. *Mohammad Bhoy v. Chutterput Singh,* I.L.R. 20 Cal. 854.
580. *Mohammad Habibullah v. Mohammad Shafi,* 50 I.C. 948.
581. *Mohandas v. Gokuldas*, 12 I.C. 507.
582. *Mohd. Basheer v. State of Kerala;* (2003) 6 SCC 159.
583. *Mohori Bibi v. Dharmodas Ghose,* I.L.R. 30 Cal. 539.
584. *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (AlB),* (1949) A.C. 196.
585. *Mondel v. Steel* (1841)8 M & W 858 at 870.
586. *Moolchand Behan Lal v. Chand & Co* .. 48 P.L.R. 243.
587. *Moon v. Raphael,* (1835) 2 Bing.N.C. 310.
588. *Moore v. D.E.R.,* [1971] 1 W.L.R. 1476, C.A. (destruction).
589. *Morgan v. Manser* [1948] 1 K.B. 184, 191
590. *Morgon v. T. Wallis*, [1974] 1 Lloyd's Rep. 165, C.A.
591. *Mostyn v. Coles,* (1862) 7 H. & N. 872.
592. *Mugneeram Bangur and Co. (P) Ltd. v. Gurbachan Singh,* AIR 1965 SC 1523.
593. *Muhammad v. Ali,* (1947) A.C. 414, P.C.
594. *Muhammad Zakariya v. Muhammad Hafiz,* 41 I.C. 233.
595. *Mulji v. Ramsey Devraj,* 3 I.C. 387 at p. 857.
596. *Municipal Board, Agra v. Asharfi Ali,* A.I.R. 1992 All. 1 at pp.3,4.
597. *Murlidhar Chiranjilal v. Harishchandra Dwarkadas,* AIR 1962 SC 366.
598. *Mussen v. Van Diemen's Land Co.,* [1938] Ch 253 at 260 : [1938] 1 All ER 210 at 216.
599. *Muthu Chettiar v. Maruthunalgum Pillai,* AIR 1930 Mad. 428 at p. 428.
600. *Muthukrishnan v. Shankaralingam Pillai,* 18 I.C. 414 at p. 438.
601. *Muthukrishnan v. Shankaralingam Pillai,* 18 I.C. 414.
602. *Muza Yaqub v. Manilal,* I.L.R. 29 Bom. 368.
603. *Mysore Sugar Co. Ltd. v. Manohar Metal Industries*, AIR 1982 Kant. 283.
604. *Mysore Sugar Co. v. Y.B. Boraiah,* (1981) 1 Kant. L.J. 263 at pp. 265, 266, 267.

605. *Nabakrishna v. Collector of Hooghly,* 2 B.L.R. 275 : W.R. Suppl. Vol. I p. 120.
606. *Nabin Chandra Saha v. Krishna Baroni,* 9 I.C. 525.
607. *Nadiar Chand v. Satish Chandra;* AIR 1927 Cal. 964.
608. *Nadirshaw v. Pirojshaw,* 19 I.C. 98.
609. *Nadreph v. Willmet & Co.,* [1978] 1 W.L.R. 1537.
610. *Naganatha Sastri v. Subramanya Iyer,* 32 M.L.J. 392 at p. 398 :
611. *Nagappa v. Venkataramayya Reddi,* AIR 1931 Mad. 137 at-pp. 138.
612. *Nagpur Nagank Sahakari Bank Ltd. v. Union of India,* AIR 1981 AP 153 at pp. 160, 161.
613. *Nait Ram v. Shib Dat*, I.L.R. 5 All 238.
614. *Namoo v. Anand,* I.L.R. 12 Cal. 291.
615. *Nanchappa Koundan v. Vetessery Tarwad Karnavan;* AIR 1927 Mad. 47.
616. *Nanjappa Chettiar v. Ganapati Goundan,* I.L.R. 35 Mad. 508 at 598 : 12 I.C. (M) 507.
617. *Narasu v. P.S.V. Iyer,* AIR 1953 Mad 300.
618. *Narayan v. Balakrishnan,* 9 Bom. H.C.R. (A.C.) 413.
619. *Naresh Chandra Sanyal v Calcutta Stock Exchange Assn Ltd;* AIR 1971 SC 422, P 428.
620. *Naridshaw v. Pirojshaw,* 19 I.C. 98 (per Beaman, J.).
621. *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, (1981) 1 All ER 161
622. *National Photograph Co. v. Edison Bull Consolidated Photograph Co. Ltd.,* (1908) 1 Ch. 335.
623. *National Provincial Bank of England v. Marshall*, (1888) 40 Ch.D. 112, C.A.
624. *Neary v. Dean of Westminster,* 91999) I.R.L.R. 288.
625. *Nicholls v. Ely Best Sugar Factory Ltd.* (1936) Ch. 343. C.A.
626. *Nickolopulos v. Lehrer*, 40 A.2d. 794, 796, 132 N.J.L. 461.
627. *Nicolls v. Elp. Beet Sugar Factory Ltd.* (1936) Ch. 343 (C.A.).
628. *Nikku Mal Sardari Mal v. Gur Prasad and Brothers*, AIR 1931 Lah. 714.
629. *Nogendra Chandra Mitter v. Kishan Soondaree Dasee,* 19 W.R. 133.
630. *Nonjibhai Karansanji v. Ramkishan Sunderlalji.* (1976) M.P.L.J. 650 at p. 653.
631. *Northam v. Hurley,* (1833) 1 E. & B. 665.
632. *Nottingham University v. Fishel,* 2001 (11) Reports of Patents, Designs and Trade Marks cases 367 at pp. 393, 394 (Q.B.D.).
633. *Nurse v. Barns,* 1 Sir T. Ray. 77.
634. *O'Conner v. Star Newspaper Co. Ltd.,* (1893) 69 L.T. 146.
635. *Oakes & Co. v. Jackson*, I.L.R. 1 Mad. 134.
636. *Ocean Tramp Tanker Corpn. v. V/o. Sovfracht* (The 'Eugenia'), (1964) 2 QB 226, at p. 239.

637. *Ocean Tramp Tanker Corporation v. V/O Sovfracht (The 'Eugenia')* (1964) 2 QB 226.
638. *O'Connor v. Hewitson (*1979) Crim.L.R. 46. C.A.
639. *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*; (2003) 5 SCC 705.
640. *Oldershaw v. Holt,* (1840) 12 A. & E. 590.
641. *Omkarlal v. Banwarilal,* A.I.R. 1962 Raj. 127.
642. *Organo Chemical Industries v. Union of India*. AIR 1979 SC 1803 at pp. 1809. 1816.
643. *Owen and Smith v. Reo Motors* (1934) 151 L.T. 274, C.A.
644. *P.R. & Co. v. Ghagwan Dass,* 10 Bom. L.R. 1113.
645. *Pagnan & Fratelli v. Corbisa Industrial Agropacuaria,* [1970] 1 W.L.R. 1306, C.A.
646. *Palsgraf v. Long Island R.R. Co.,* Court of Appeals of NY, (1928) 284 NY 339.
647. *Panchaud Freres SA v. Establissements General Grain Co.,* [1970] 1 Lloyd's Rep 53.
648. *Panna Singh v. Aljun Singh,* AIR 1929 P.C. 179 at p. 180.
649. *Pannalal v. Hussaing Beg,* AIR 1924 All 167.
650. *Paradine v. Jane,* (1647) Aleyn 26.
651. *Parasharsingh v. Hindustan Managanese Mines Ltd.,* 1968 M.P. L.J. 846 at p. 853.
652. *Parry v. Cleaver,* [1970] A.C. 1.
653. *Parshotam Das Shankar Das v. Municipal Committee, Batala,* AIR 1949 EP 301.
654. *Parsons (H.) Livestock) Ltd. v. Uttley Ingham & Co. Ltd.,* (1978) Q.B. 791.
655. *Parsons v. B.N.M. Laboratories Ltd.*, [1964] 1 Q.B. 95 : [1963] 2 W.L.R. 1273 : 107 S.J. 294 : [1963] 2 All ER 658
656. *Parsons v. Sexton,* (1847) 4 C.B. 899.
657. *Parusnath Saha v. Brijo Lal,* 8 W.R. 44.
658. *Parvati* v. *Manner,* I.L.R. 8 Mad. 175 at p.181.
659. *Pasalapudi Brahmayya v. Tugala Gangarasu* (1963) 1 Andh. W.R. 149.
660. *Patch v. Solar Corp.*, C.C.A. Wis., 149 F.2d 558, 560.
661. *Patrick v. Russo- British Grain Export Co. Ltd.*, (1972) 2 K.B. 535.
662. *Payne v. Railway Executive,* [1952] 1 K.b. 26, C.A.
663. *Payzu V. Saunders,* [1919] 2 K.B. 581, C.A.
664. *Perera v Vtmdiyar* [1953] 1 All ER 1109 : [1953] 1 WLR 672 (CA).
665. *Philips v. Ward,* [1956] 1 W.L.R. 471, C.A.; *Perry v. Sidney Phillips & Son,* [1982] 1 W.L.R. 1297, C.A.
666. *Phillips Hong Kong Ltd. v. Attorney-General of Hong Kong,* (1993) 61 Build. L.R. 41 (P.C.).
667. *Phillips v. Britannia, etc. Laundry* [1923] 2 K.B. 832.
668. *Phonographic Equipment (1*958) *Ltd v Muslu* [1961] 3 All ER 626.
669. *Phoolchand v. Punaram,* 1963 M.P.L.J. Note No. 84.

670. *Photo Production Ltd. v. Securicor Transport Ltd.,* [1980] AC 827 : [1980] 1 All Er 556.
671. *Pickering v Thoroughgood,* (1533) 8.
672. *Pilkington v. Wood,* [1953] Ch. 770.
673. *Pillamarri Lakshmikantham v. Ramakrishna Pictures, Vijayawada*, AIR 1981 A.P. 224.
674. *Planche v. Colburn,* (1831) 8 Bing 14.
675. *Plevin v. Henshall,* (1833) 10 Bing. 24.
676. *Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) A.C. 79.
677. *Pontifix v. Bignold,* (1841) 3 M. & G. 63.
678. *Port Line Ltd. v. Ben Line Steamers Ltd.,* (1958) 2 QB 146.
679. *Praed v. Graham,* (1890) 24 Q.B.D. 53, C.A. (libel).
680. *Pravudayal v. Ramkumar.* AIR 1956 Cal. 41 : 95 C.L.J. 280.
681. *Prehn v. Royan Bank of Liverpool*, (1870) 5 Exch. 92.
682. *Prema v. Mustak Ahmed;* AIR 1987 Guj. 106.
683. *Preston v. Humphreys,* AIR 1952 Cal. 315 at p. 318.
684. *Price v. Green,* (1847) 15 M & w. 346: 16 L.J. Ex. 108.
685. *Protector Loan Co. v. Grice,* (1880) 5 Q.B.D. 592.
686. *Public Works Commissioner v. Hills* [1906] A.C. 368, P.C.
687. *Puran Deb v. Govinda Ram*, 15 C.P.L.R. 39.
688. *Pye v. British Automobile Commercial Sundicate Ltd.*, (1906) 1 K.B. 425.
689. *Quim v. Leathem,* (1901) A.C. 495.
690. *Quirk v. Thomas*, (1916) 1 KB 516.
691. *R. & H. Hall, Ltd. v. W.H. Pin. (Junior) & Co.,* (1928) 33 Com. Cas. 324
692. *R. v. Reading J.J., ex. p. South West Meat,* (1992) Crim. L.R. 672.
693. *R.D. Hattangadi v. Pest Control (India) Put. Ltd.,* 1995 (1) T.A.C. 557 (S.C.).
694. *R.V. Ward Ltd. v. Bignall,* [1967] 1 QB 534 : [1967] 2 Al ER 449.
695. *Radha Kishun Kaul v. Shankar Das,* AIR 1927 Lah. 252 at p. 255.
696. *Raghavachariar v. Srinivasa Raghavachariar,* 31 M.I.J. 575 : I.L.R. 4 Mad. 308.
697. *Raghoonath v. Govindnarain*, I.L.R. 12 Cal. 45.
698. *Raghunadhiya v. Sobina Saldanha,* 36 M.L.J. 161 : 49 I.C. 722.
699. *Raj Coomar Rai v. Rajah Debendro Narain,* 15 W.R. 41.
700. *Raj Inder Bahadur Singh v. Bhagwan Dina,* 7 C.W.N. 963.
701. *Raja Dhruv Dev Chand v. Raja Harmohinder Singh,* AIR 1968 SC 1024.
702. *Raja of Ramnad v. Sellachami Tewar,* AIR 1917 Mad 405.
703. *Rajabhai Narain v. Haji Karim Mamood,* 35 M.L.J. 189.

704. *Rajagopala Padayachiv Varadaraja Pandachi,* AIR 1925 Mad. 84 at pp. 84. 85: 47 M.L.J. 605.
705. *Rajeshwar Prasad v. Chunilal,* AIR 1942 Pat. 269 at p. 270.
706. *Rajkot Municipal corporation v. Manjulben Jayantilal Nakum,* 1997 (2) T.A.C. 461 at p. 497 (S.C.).
707. *Ram Kishun v. Banwari Rai,* 25 I.C. 266.
708. *Ram Koomar Condoo v. Chandra Kanta Mookerjee,* I.L.R. 2 Cal. 233.
709. *Rama v. Shivram,* I.L.R. 6 Bom. 116.
710. *Ramakrtshnayya v. Venkata Somazulu,* AIR 1934 Mad. 31 at p. 36 [F.B.].
711. *Ramalinga Mudaliar v. S.R. Muthuswami Ayyar & Sons;* AIR 1927 Mad. 99.
712. *Ramalinga v. Meenakshi Sundaram,* AIR 1925 Mad. 177.
713. *Ramalingam v. Gokuldas*, A.I.R. 1926 Mad. 1021.
714. *Ramaswamy Gounder v. Kuppuswami Gounder,* (1978) 2 M.L.J. 313 at p. 318.
715. *Ramchand v. Nuddiar Ghose*, 23 W.R. 230.
716. *Ramkaur v. Shankar Dutt,* 108 I.C. 433.
717. *Ramkumar v. P.C. Roy & Co. (India) Ltd.,* AIR 1952 Cal 335.
718. *Ramnath Zutshi v. Secretary of State.* 12 I.C.46.
719. *Rampal Sahu v. Misree Lall,* 24 W.R. 97; *Hari v. Hari,* 15 I.C. 541.
720. *Rangaswami Iyer v. Venkatarama Iyer,* 28 I.C. 635 at p. 637.
721. *Ratdiffe v. Evans,* (1892) 2 Q.B. 524 : 61 L.J. Q.B. 535.
722. *Rawlings v. Morgan,* (1865) 18 C.B.
723. *Raymond v. Fitch,* (1835) 5 L.J. Ex. 45.
724. *Re Badische Co.* [1921] 2 Ch. 331, at p. 379
725. *Re Newman* (1876) 4 Ch.D. 724. C.A.
726. *Re Vic Mill,* [1913] 1 Ch. 465, C.A.
727. *Read v. Brown,* (1889) 22 Q.B.D. 128 : 58 L.J.Q.B. 120.
728. *Redpath v. Belfast and County Down Ry,* [1947] N.I. 167.
729. *Reed v Madon [1989]* Ch 408 : [1989] 2 All ER 431;
730. *Reid v. Rigby,* [1894] 2 Q.B. 40.
731. *Relly v. Jones,* (1823) 1 Bing., 302 : 1 L.J. O.S. C.P. 105.
732. *Reversion Fund and Insurance Co. v. Maison Cosway,* [1913] 1 K.B. 364, C.A.
733. *Rex v. Pagham Commissioners,* (1828) 8 B. & C. 355.
734. *Reynold v. Bridge,* (1856) 6 E. & B. 528.
735. *Richardson v. Redpath, Brown & Co.,* [1944] A.C. 62.
736. *Ridley v. De Gurto*, (1945) 2 All ER 654.
737. *Robbins of Putney v. Meek,* [1971] R.T.R. 345.
738. *Robers v. Havelock,* (1832) 3 B 7 Ad 404.
739. *Roberts v. Ellwells Engineering Ltd.,* (1972) QB 586.
740. *Robinson v. Harman,* (1848) 1 Ex. 853.

741. *Robophone Facilities v. Blank* [1966)1 W.L.R. 1428, C.A.
742. *Rockingham County v. Luten Bridge Co.,* 35 F 2d. 301.
743. *Rodocanachi v. Milburn,* (1886) 18 QBD 67, p. 78.
744. *Rogers Shellac Co. v. John King & Co.,* AIR 1926 Cal. 564 at p. 565.
745. *Rook v. Fairrie,* (1941) 1 K.B. 507, C.A.
746. *Rookes v. Barnard* (1964) A.C.1129.
747. *Roper v. Johnson,* (1873) L.R. 8 C.P. 167.
748. *Rosenthal v. Alderton,* [1946] K.b. 374, C.A.
749. *Roshan Lal v. Manohar Lal* ; AIR 2000 Del 31.
750. *Russkoe Obsehestvo D' liar Iztstovleria Sharidav Ivoennick Pripassav v. John Stirk & Sons Ltd.,* (1922) 10 LL LR 214.
751. *Russokoe & Co. v. John Stirk and Sons Ltd*., (1922) 10 LR 214.
752. *Ruxley Electronics v. Forsyth,* [1996] A.C. 344; [1995] 3 W.L.R. 118; [1995] 3 All ER 268; 73 B.L.R. 1.
753. *S. v. Distillers Co. (Biochemicals),* [1970] 1 W.L.R. 114.
754. *S.A.P. Devasthanam v. Sabapathi Pillai,* AIR 1962 Mad 132.
755. *Sachs v. Miklos,* [1948] 2 K.b. 23, C.A.
756. *Sadasivayya v. Venkatanarayana & Co.,* AIR 1953 Mad. 845, 846 : (1953) 1 M.L.J. 811 : 1953 M.W.N. 561.
757. *Saha Lal v. Amba Prasad,* AIR 1922 All 526.
758. *Said v. Butt.*(1920) All. E.R. 240 at p. 241.
759. *Saint Lines v. Richardsons Westgarth & Co.* (1940) 2 K.B. 99.
760. *Sainter v. Ferguson,* (1849) C.B. & 716 : 18 L.J.C.P. 217.
761. *Salih v. Enfield health Authority,* [1991] 3 All ER 400, C.A.
762. *Salt v. Marquiss of Northampton* (1892) AC. 1 : 61 L.J. Ch. 49.
763. *Samuel v. Newbold,* (1906) A.C. 461 : 75 L.J. Ch. 705.
764. *Sanders v. Stuart,* (1876) 2 C.P.D. 326.
765. *Sapwell v. Bass,* (1910) 2 K.B. 486.
766. *Saraswati Parabhal v. Grid Corp., Orissa,* AIR 2000 Ori 13.
767. *Sardar Baldev Singh Sardool Singh v. Union of India,* AIR 1965 J. & K. 28 at p. 31.
768. *Sardar Gurubax Singh Gorowara v. Begum Rafiya Khurshid,*, 1979 M.P.L.J. 96 at pp.99, 100.
769. *Sardar Khan v. Munshi*, 1961 M.P.L.J. 165.
770. *Sartolhama Rao v. Chairman, M.C. Saidpt,* AIR 1923 Mad. 475 at pp. 477, 478.
771. *Satyabarat Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44.
772. *Satyabrata v. Mugneeram.* AIR 1954 SC 44.
773. *Satyanarain Amolchand Bhutt v. Vital Narain Gawdar,* AIR 1959 Born 462 at p. 468 : 59 Born. L.R. 1071 : I.L.R. (1957) Born. 840.
774. *Satyanarayan A. Bhatt v. Vithal N. Jandar*; 1957 BLR 1071.

775. *Savage v. Wallis,* [1966] 1 Lloyd's Rep. 357, C.A.
776. *Scammell G. and Nephew Ltd. v. Hurley,* (1928) 1 K.B. 419.
777. *Scanlan's New Neon Ltd. v. Tooheys Ltd.*, (1943) 67 CLR 169, 197.
778. *Scarf v. Jardine,* (1882) 7 App Cas 345 at 361.
779. *Secretary of State v. Rukminibai,* AIR 1937 Ng. 354.
780. *Seetaramaswami v. Secretary of State of India*, AIR 1925 Mad. 682.
781. *Selvanayagam v. University of the West Indies,* [1983] 1 W.L.R. 585, P.C.
782. *Serajuddin v. State of Orissa,* AIR 1961 SC 1285. (1920) 2 KB 714. Referred.
783. *Seth Ajodhya Prasad v. Sivaprasad;* AIR 1927 Nag. 18.
784. *Seth Mohan Lal v. Grain Chambers Ltd., Muzaffarnagar,* AIR 1968 SC 772.
785. *Setharazu v. Basappa,* 24 M.L.J. 363 : 18 I.C. 968.
786. *Seven Seas Properties v. Al Essa (No 2)*, (1993) 1 W.L.R. 1083, *Hadley v. Baxendale*, (1854) 9 Exch, 341.
787. *Seven Seas Properties v. Al Essa (No.2),* (1993) 3 All E.R. 577.

788. *Sewdutt Roy Maskara v. Nahapit,* I.L.R. 34 Cal. 628.
789. *Shamsuddin v. Dayhabhai,* AIR 1924 Bom. 357 at pp. 357, 358.
790. *Shaw v. Holland,* (1846) 15 M. & W. 136.
791. *Sheikh Jaru Bepari v AG Peters,* AIR 1942 Cal 493.
792. *Shepherd v. Johnson,* (1802) 2 East 211.
793. *Shindler v. Northern Raincoat Co.,* [1960] 1 W.L.R. 1038.
794. *Shiv Ispat Udyog Pvt. Ltd. v. Industries Valley*, AIR 1984 Del 405.
795. *Shiva Jute Baling Limited v Hindley & Co Ltd,* AIR 1959 SC 1357 : [1960] 1 SCR 569.
796. *Short v. Stone* (1846) 8 QB 358.
797. *Sikes v. Wild,* (1863) 1 B. & S. 587.
798. *Simon v. Pawsons & Leafs,* (1933) 38 Com. Cas. 151, C.A.
799. *Simpson* v. *London and North Western Railway Company,* (1876) 1 Q.B.D. 274.
800. *Simson v. Pawsons & Leafs,* (19330 38 Com. Cas. 151, C.A.
801. *Sinclair v. Vowles,* (1829) 9 B & C 92.
802. *Singh (an infant) v. Toong Fong Omnibus Co. Ltd.,* (1964) 3 All. E.R. 925 at p. 927.
803. *Siordet v. Hall,* 29 R.R. 651 : 4 Bing. 607.
804. *Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Words Asquith,* (1949) 2 KB 632, 665.
805. *Sitaram v. G.I.P. Ry. Co.,* A.I.R. 1947 Nag. 224 at pp.227, 228.
806. *Slater v. Hoyle & Smith,* [1920] 2 K.B, 11, C.A.
807. *Smailes v. Hans Dessen,* (19050 L.T. 492.
808. *Smeed v. Ford,* (1859) I.E. & E. 602.

809. *Smith v. Dickenson,* (1804) 3 B. & P. 630.
810. *Smoker v. London Fire Authority,* [1991] 2 A.C. 502.
811. *Smt. Sushila Devi v. Hari Singh,* AIR 1971 SC 1756.
812. *Sohan Lal v. Amba Prasad,* A.I.R. 1922 All. 526 at p. 526.
813. *Sorab Shah vs. Secretary of State*; 1927 BLR 1535.
814. *South Australia Asset Management Co. v. York Montague Ltd.* (1997) A.C. 191.
815. *South Helton Coal Co. v. North Eastern News Association,* (1894) 1 Q.B. 133: 63 L.J. Q.B. 293.
816. *South Wales Miners' Federation v.* Glamorgan Coal Co., (1904) 2 All. E.R. 361.
817. *Spalding v. Gamage,* (1918) 35 R.P.C. 101, C.A.
818. *Sparrow v. Paris* (1862) 7 H. & N. 594 at 599.
819. *Sri Mahalingaswami Devasthanam v. A.T. Sambanda Mudaliar,* AIR 1962 Mad 122.
820. *Srinivasa Dikshltulu v. Rangayya,* 25 I.C. 702.
821. *St. Enoch Shipping Co. Ltd. v. Phosphate Mining Co.,* [1916] 2 KB 624 at 628.
822. *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.,* [1978] 3 All ER 769 : [1978] 1 WLR 1387.
823. *Stanley v. Powell,* (1891) 1 Q.B. 86.
824. *Stanton v. Richardson,* (1872) LR 7 CP 421.
825. *Startup v. Cortazzi,* (1835) 2 C.M. & R. 165.
826. *State of Gujarat v. M.K. Patel and Co ..* AIR 1985 Guj. 179.
827. *State of Karnataka v. Rameshwars Rice Mills, Thirthahalli,* AIR 1987 SC 138.
828. *State of Orissa v. Calcutta Company Limited;* AIR 1981 Orissa 206 at p. 209.
829. *State of U.P. v. Tipper Chand,* AIR 1980 SC 1522.
830. *State vs. M/s. United Shippers & Dredgers Ltd.*, AIR 1981 Ker. 281.
831. *Steele v. Robert George & Co.,* [1942] A.C. 497.
832. *Sterne v. Beck.* (1863) 32 L.J. Ch. 682.
833. *Stonedal No. 1 (Owners) v. Manchester Ship Canal Co;* (1955) 2 All.E.R. 682 (H.L.)
834. *Stroms Brucks Aktie v. Hutchinson,* (1905) A.C. 515.
835. *Strutt v. Whitnall,* [1975] 1 W.L.R. 870, C.A.
836. *Stubbs v. Holy Well Ry. Co.,* (1867) 2 Exh. 311.
837. *Subramanya v. Narayanan,* I.L.R. 24 Mad. 130.
838. *Suhbaraya v. Venkatarama Iyer*, 32 I.C. 592.
839. *Sumpter v. Hedges,* [1898] 1 QB 673.
840. *Sundaramul v. Ladhuram,* AIR 1924 Cal. 240 at p. 242.
841. *Sunder Koer v. Sham Krishen*, I.L.R. 34 Cal. 150.
842. *Surendra Singh v. Chiraguddin,* 1998(2) T.A.C. 84 at p. 85 (Raj.).
843. *Suresh Narain v. Akhauri,* AIR 1957 Pat 256.
844. *Surpat Singh v. Sheo Prasad,* AIR 1945 Pat 300.
845. *Surti Chetti v. Gadala Parthasarthy,* 61 I.C. 457.

846. *Sushila Devi v. Hari Singh,* AIR 1971 SC 1756.
847. *Synge v. Synge,* [1894] 1 QB 466.
848. *T.O.T. Co. v. Uganda Sugar Factory*, AIR 1945 PC 144.
849. *T.V. Kochuvareed v. P. Mariappa Gounder,* AIR 1954 Travancore Cochin 10.
850. *Talbot v. Berkshire County Council,* [1994]Q.B. 290; [1993] 3 W.L.R. 708; [1993] 4 All ER 9;
851. *Talchar Coalfields Ltd. v. Central Coalfields Ltd.*, AIR 1978 Cal. 449.
852. *Talley v. Wolsey-Neech,* (1978) 38 P. & C.R. 45, C.A.
853. *Tamplin Steamship Co. Ltd v. Anglo-Mexican Petroleum*, *etc., Co. Ltd* [1916] 2 A.C. 397.
854. *Tan Ah Boon v. State of Johore,* AIR 1936 P.C. 236 at p. 238.
855. *Tappling v. Jones,* (1895) 11 H.L.C. 290.
856. *Tatem Ltd. v. Gamboa,* (1939) 1 KB 132, at p. 138.
857. *Taylor v. Caldwell,* (1863) 3 B & S 826.
858. *Taylor v. Hemiker,* (1849) 12 Ad. 488.
859. *Taylor v. Webb,* [1937] 2 KB 282 : [1937] 1 All ER 590.
860. *Thawardas Pherumal v. Dominion of India*, AIR 1955 S.C. 468 at pp. 471, 472 : (1955) 2 M.L.J. (S.C.) 23; 1955 S.C.J. 445 : 1955 S.C.A. 862 : (1955) 2 S.C.R. 48 : 1955 M.W.N. 782 : I.L.R. 34 Pat. 359 : 57 Punj. L.R. 369.
861. *The Board of Trustees for the Port of Calcutta v. Dhanrajmal Gobindram,* AIR 1978 Cal. 369.
862. *The Kriti Rex,* [1996] 2 Lloyd's Rep. 171.
863. *The Liesbosch,* [1933] A.C. 449.
864. *The Lily Prima,* [1976] 2 Lloyd's Rep. 487.
865. *The Liverpool (No.2),* [1963] P. 64, C.A.
866. *The Municipal Board of Agra v. Ashraf Ali*, AIR 1922 All. 1 at pp. 3,4.
867. *The Naihati Jute Mills Ltd. v. Khyaliram Jagannath,* AIR 1968 SC 522
868. *The Nema,* (1981) 2 All ER 2030.
869. *The See Maredelanto Cia Naviera SA v. Bergbau-Handel GmbH, The Mihalis Angelos,* [1971] 1 QB 164 : [1970] 3 All ER 125.
870. *The Solholt* (1981) 2 Lloyds Rep. 574 at 580.
871. *The Timawra,* [1996] 2 Lloyd's Rep. 166.
872. *The Vladimir Ilich,* [1975] 1 Lloyd's Rep 322.
873. *The World Beauty,* [1970] P. 144, C.A. at 156.
874. *Thompson (D.C.) v. Deakin.* (1952) 2 All. E.R. 161 : (1952) Ch. 646.
875. *Thompson v. Robinson,* [1955] Ch. 177; Lazenby Garages v. Wright, [1976] 1 W.L.R. 459, C.A.
876. *Thomson v. Deakins,* (1952) 2 All.E.R. 366 at 378.
877. *Tindall v. Bell,* 63 R.R. 584 : 11 M. & W. 232.
878. *Tolhurst v. Asociation of Cement Manufacturers,* (1902) 2 K.B. 660 at pp. 668, 669.

879. *Tolley v. Fry (*1930) 1 K.B. 467. CA. at 476.
880. *Toolsidas v. Venkatachallapathy,* AIR 1921 PC 46.
881. *Topfer v. Warinco A.G.,* [1978] 2 Lloyd's Rep. 569.
882. *Total Oil (Great Britain) Ltd. v. Thompson Garages (Biggin Hill) Ltd.,* [1971] 3 All ER 1226.
883. *Total Transport Corporation v. Amoco Trading Co., The Altus,* (1985) 1 Lloyd's Rep. 423.
884. *Totaram v. John's Flour Mill,* 10 I.C. 18;
885. *Tower Hamlets London Borough Council v. British Gas Corpn,* [1984] CLY 393.
886. *Trade and Transport Inc. v. Iino Kaiun Kaisha Ltd.*, (1973) 1 WLR 210, 221.
887. *Tramways Advertising Pty Ltd. v. Luna Park (NSW) Ltd.,* (1939) 38 SRNSW 632 at 641.
888. *Trans Trust S.P.R.L. v. Danubian Trading Co.,* (1952) 2 Q.B. 297, C.A.
889. *Transworld Oil Ltd. V. North Bay S.S. Cpn.* (1987) 2 Lloyd's Rep. 173.
890. *Trilokyanath Biswas v. Joykali Chowdrani,* 11 C.L.R. 454.
891. *Troll Markay v. Kameshwar Singh*, AIR 1932 PC 196.
892. *Tsakiroglou & Co. v. Noblee Thorl GMBH*, 1962 AC 93.
893. *Tucker v. Linger,* (18820 21 Ch.D. 18.
894. *Tullidge v. Wade* (1769) 3 Wils. K.B. 18 (seduction).
895. *Turner v. Goldsmith* [1891] 1 QB 544.
896. *Twyman v. Knowles,* (1853) 13 C.B. 222.
897. *Umarkhan Mahamadkhan Deshmukh v Salekhan;* (1893-94) ILR 17-18 Born 70, p III per Sargent CJ.
898. *Underwood v. Bank of Liverpool,* [1924] 1 K.B. 775, C.A.
899. *Union Bank of India v. Ramdas Madhav Prasad*; (2004) 1 SCC 252.
900. *Union Eagle Ltd. v. Golden Achievement Ltd. ;* [1997] 2 W.L.R. 341.
901. *Union of India v. Baij Nath Mandal,* AIR 1951 Pat. 219.
902. *Union of India v. Damani & Co.,* AIR 1980 SC 1149.
903. *Union of India v. Dass,* AIR 1955 Pepsu 51.
904. *Union of India v. M/s. Commercial Metal Corporation;* AIR 1982 Delhi 267.
905. *Union of India v. M/s. Jolly Steel Industries (P) Ltd.,* AIR 1980 SC 1346.
906. *Union of India v. Ms. Commercial Metal Corporation,* AIR 1982 Del. 267.
907. *Union of India v. R.D. & Co.,* AIR 1973 SC 1908.
908. *Union of India v. Ram Chandra,* AIR 1975 All. 221 at p. 225.
909. *Union of India v. Raman Iron Foundry,* (1974) 2 SCC 231.
910. *Union of India v. Vasudeo Agarwal*, A.I.R. 1960 Pat. 87 p. 92.

911. *Union of India vs. Tribhvandas Lalji Patel,* AIR 1971 Delhi 120.
912. *United India Fire and General Insurance Company Ltd., Guntur v. Mowli Bai,* AIR 1985 A.P. 263 at pp. 266, 267.
913. *United Societies Committee v. Madison Square Garden Corp.*, 59 N.Y.S.2d. 475, 476, 186 Misc. 516.
914. *Uren v. John Fairfax & Sons Pty,* (1967) Argus L.R. 25 : (1966) 40 A.L.J.R. 124.
915. *Utkal Automobiles (P) Ltd. v. B.P. Roy,* AIR 1976 Ori 15.
916. *Uttar Pradesh State Sugar Corporation v. Mahalchand M. Kothari,* (2005) 1 SCC 348.
917. *Vallabhdas v. Nagardas,* 23 Bom. L.R. 1213.
918. *Vankineni Sadasiva Chakradhara Rao v. Sri Sardar Pratap Singh*. (1975) 2 Andh. W.R. 117 at p. 121.
919. *Vaughan v. Taff Valley Rly. Co.,* (1860) 5 H. & N. 679.
920. *Vengideswara Puttar v. Chatu Ache*:1, I.L.R. 3 Mad. 224.
921. *Venkata Satyanarayana v. National Insurance Co. Ltd .,* AIR 1947 Mad. 51: (1946) 2 M.L.J. 426.
922. *Victoria Laundry (Windsor Ltd.) v. Newman Industries Ltd.* (1949) 2 K.B. 528.
923. *Vide Morgan v. Manser*, 1947-2 AII ER 666 (L).
924. *Vigars v. Cook,* (1919) 2 K.B. 475.
925. *Viscount Haldane in British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.
926. *Vishwanath v. Amarlal*, AIR 1957 M.B. 190.
927. *Vitol SA v. Norelf Ltd., The Santa Clara,* [1994] 4 All ER 109.
928. *Vittappa Kudua v. Durgamma,* 55 I.C. 781.
929. *Vorvis v. Insurance Corpn of British Columbia,* (1989) 1 SCR 1085.
930. *W. Devis & Sons Ltd. v. Atkins,* [1977] Ac 931 : [1971] 2 All ER 321.
931. *W.J. Alan & Co. Ltd., v. El Nasr Export and Import Co.* [1972] 2 QB 189 : [1972] 2 All ER 127.
932. *W.J. Tatem Ltd v. Gamboa* [1939] 1 K. B. 132
933. *W.L. Thompson Ltd. v. Robinson (Gunmakyrs) Ltd.*, (1955) 1 ALL ER 809.
934. *Wadsworth v, Lydall,* (1981) 1 W.L.R. 598, C.A.
935. *Waghela Raj Sanji v. Seikh Masludin,* I.L.R. 11 Bom. 551 at p. 561.
936. *Wall v. Rederiaktiebolaget Luggude* [1915] 3 K.B. 66 at 72.
937. *Wallace-Turner v. Cole* (1983) 46 P. & C.R. 164 at 168.
938. *Wallems Rederij v. Muller ,* [1927] 2 K.B. 99
939. *Wallis v. Smith* (1882) 21 Ch.D. 243, C.A.
940. *Wallis, Son and Wells v. Pratt and Haynes,* [1910] 2 KB 1003 at 1012.
941. *Walter v. Alltools* (1944) 61 T.L.R. 39, C.A.
942. *Walton Harvey Ltd. v. Walter and Homfrays Ltd.,* (1931) 1 Ch. 274.

943. *Walton v. Fothergill,* (1835) 7 C. & P. 392.
944. Ward v. Smith, (1832) 11 Price 19.
945. *Warre v. Colvert,* (1837) 7 Ad. & Edn. 143.
946. *Warwick v. Faulkes* (1844) 12 M. & W. 507.
947. *Waters v. Towers,* (1853) 8 Ex. 401 : 22 L.J. 186 : 155 E.R. 1404.
948. *Watt v. Morrow,* [1991] 1 W.L.R. 1421; [1991] 4 All ER 937; (1991) 23 H.L.R. 608; 54 B.L.R. 86; [1991] 2 E.G.L.R. 152; [1991] 43 E.G. 121.
949. *Watts v. Mitsui,* (1917) A.C. 227.
950. *Watts v. Morrow,* [1991] 4 All ER 937.
951. *Webb v. Lestur,* 2 Bom. HC.R. 52 at p. 56; 59I.C. 143 : 28 I..C. 349.
952. *Webster v. Bosanaquet.* 16 I.C. 147: (1912) A.C. 394.
953. *Weir v. Dobell,* [1916] 1 K.B. 722.
954. *Weld & Co. v. Harcharan*, 4 Lah. L.J. 317.
955. *Weld-Blundell v. Stephens,* (1920) A.C. 956 at 983.
956. *Wells v. Mody,* (1835) 7 C.&P. 59.
957. *Wertheim v. Chicoutimi Pulp Co,* [1911] A.C. 301, P.C.
958. *West v. Houthton,* (1879) 4 C.P.O. 197.
959. *West Street Warehouse v. American President Lines,* 58 N.Y.S.2d. 722, 726, 186 Misc. 238.
960. *Westminster v. Swinton,* [1948] 1 K.B. 524.
961. *White and Carter (Councils0 Ltd v. McGregor*, [1962] AC 413 : [1961] 3 All ER 1178.
962. *White and Carter v. McGregor,* [1962] A.C. 413.
963. *White v. Sealy* (1778) Doug. 49.
964. *Widnes Foundry v. Cellulose Acetate Silk Co.,* (1931) 2 K.B. 393, C.A.
965. *Wigsell v. School for Indigent Blind,* (1882) 8 Q.B. D. 357
966. *Wilbeam v. Ashton,* (1807) 1 Camp. *78.*
967. *Wilde v. Clarkson* (1795) 6 T.R. 303.
968. *Wileman v. Minilec Engineering,* (1988) 1 C.R. 318.
969. *Wilkes v. Woods,* (1763) Lofft 1;
970. *Williams v. Settle* (1960) 1 W.L.R. 1072, C.A.
971. *Williams v. Agius,* [1914] A.C. 510.
972. *Williams v. Peel River Land and Mineral Co. Ltd.* (1886) 55 L.T. 689 : 3 T.L.R. 76 (C.A.).
973. *Williams v. Settle,* (1960) 1 W.L.R. 1072, C.A.
974. *Willingford v. Mutual Society,* (1880) 5 App. Cas. 685.
975. *Wilson v Love* [1896J I QB 626, p 629, [1895-99J All ER Rep 325.
976. *Wilson v. Lancs. & Yorks. Ry.* (1861) 9 C.B.N.S. 632.
977. *Wilson v. United Counties Bank,* [1920] A.C. 102 at 125.
978. *Winter v. Trimmer* (1762) 1 Wm.Bl. 395.
979. *Withers v. General Theatre Corpn.,* [1933] 2 KB 536 : [1933] ER Rep 385.

980. *Workers Trust and Merchant Bank v. Dojap Investments,* [1993] A.C. 573; [1993] 2 W.L.R. 702; [1993] 2 All ER 370.
981. *Wroth v. Tyler* (1974) Ch.30.
982. *Xenox v. Curnow,* (1975) 12 S.A.S.R. 301.
983. *Yarlagadda China Ramayya v. Donepur Venkata Ramayya,* AIR 1959 A.P. 552.
984. *Yetton v. Eastwoods Froy,* [1967] 1 W.L.R. 104.
985. *Young v. Chalkley,* (1867) 16 L.T. 286.

`H'

LIST OF BOOKS REFERRED

1. Anson, W.R., 20th Edition, 1981, 21st Edition 1959 and 23rd Edition, 1971, Principles of English Law of Contract.
2. Atiyah P.S., (1985), The Rise and fall of freedom of Contract.
3. Atiyah, P.S., (1961), Introduction to the Law of Contract.
4. Awasthi, (1872), Digest on Contract Act, Dwivedi & Company; 1999.
5. Awtar Singh, (2005), 9th Edition, Indian Contract Act, Eastern Boook Company.
6. Bahgia R.K.(Dr.), 1994(1), Law of Contract & Specific Relief with Special Emphasis on Law of Tender.
7. Betson, J., (1998), Anson's Law of Contract.
8. C.G.Wearamantry, (1998), The Law of Contract, Lawman Indian Pvt. Limited.
9. C.Kameshwara Rao, (2005), 6th Edition, Vol. I, II and II, Law of Damages & Compensation, Law Publishers (India) Private Limited.
10. Cheshire, Fifoot & Furmston, 14th Edition, Law of Contract, Lexis Nexis Butterworths.
11. Cheshire, Fifoot & Furmston, 3rd Edition, 1959 and 6th Edition, 1973, Cases on the Law of Contract.
12. Cheshire, Fifoot & Furmston, 4th Edition, 1956, 7th Edition 1969 and 8th Edition 1972, Law of Contract.
13. Cheshire, Fifoot & Furmston, Cases on Law of Contract.
14. Chitaley & Rao, (1956), 57th Edition, Vol. I to V, Contract Act.

15. Chitty, (1989), Vol. I and II, Contracts – General Principles.
16. Chitty, (1999), 28th Edition, Volume-I, II and Supplementary, Chitty on Contract, Sweet & Maxwell.
17. Chitty, (2001), Mercantile Contracts, Universal Law Publishing Co. Pvt. Limited.
18. Chitty, 19th Edition, 1937; 21st Edition, 1955 and 23rd Edition 1968; Supplement 1962 Edition, Vol I and II, The Law of Contracts.
19. Chorley & Giles, Slaters Mercantile Law.
20. Curzen, L.B., (1995), Contract Law, Cavendish Publication.
21. Davin E. Allen, Asian Contract Law.
22. Dean Pound, An Introduction to the Philosophy of Law.
23. Demmis LLoyd on Law of Contract.
24. Desai, T R, (1948), 14th Edition, Indian Contracts Act, Sale of Goods Act and Partnership Act, UBA, 15th Edition in 1955 and 17th Edition in 1968.
25. Dias on Jurisprudence.
26. Fortedmamm, Law of Contract.
27. G.H. Treitel, The Law of Contract.
28. H.K.Saharay, (1998), 9th Edition, Dutt on Contract, Eastern Book Company.
29. Hallsbury's Laws of England.
30. J.C. Smith and J.A.C.Thomson, A Case Book on Contract.
31. J.P.Singhal, Indian Contract Act.
32. Jaswant Singh, (1999 – 2001), Law of Contract and Specific Relief with Special Emphasis, MLJ Madras.
33. Julius Stone, Law of Contract.
34. Leake, Principles of Law of Contract.
35. M.C.Shukla, A Manual of Mercantile Law.

36. M.R.Malik, (1999), Commentaries on Indian Contract Act, Kamal Law House.
37. Mannah Suff, Essential Contract Law.
38. McGregor, (1997), 16th Edition, Damages, Sweet and Maxwell Limited, London.
39. Mehrave Pannam Hocker, Cases and Materials on Contract.
40. Nagendra Singh, Commercial Law of India.
41. Neelima Bhadbhade, (1997), Indian Contract Act and Specific Relief Act, Cavendish Publication.
42. Odgers, Introduction to the Law of Contract.
43. Paton on Jurisprudence.
44. Pollock & Mulla, Vol. I and II, 8th Edition 1957, 9th Edition 1972 and 12th Edition 2001, Law of Contract.
45. Pollock, (1950), 13th Edition, Principles of Contracts.
46. Professor Friedmann, Legal Theory.
47. R.C. Chawla and K.C.Garg, Commercial Law.
48. R.H. Pandya, Principles of Mercantile.
49. Ramaswami, B.S., (2002), Contracts and Their Management, Lexis Nexis.
50. Rao, K. Venkoba, (1955), Commentaries on Indian Contract Act.
51. Rao, S., 3rd Edition, 1950 & 4th Edition, 1955, Indian Contract Act, 1872.
52. Raw. V Kesava, (2004), Contracts I – Cases and Materials, Lexis Nexis.
53. S.R. Daver on Mercantile Law.
54. Salmond on Jurisprudence.
55. Salzedo, Simson, (1995), Brief Case on Contract Law, Cavendish Publication.
56. Sanjeev Rao, (1998), 9th Edition, Vol. I, II, II, Contract Act and Law Relating to Tenders, Delhi Law House.

57. Sanjiva Rao, 8th Edition, 1976 & 9th Edition, 1983, Vol.I and II, Contract Act and Law relating to Tenders.
58. Sen, G.M., (1970), Case Book on the Law of Contract.
59. Shastri, Indian Contract Act.
60. Shepherd and Sher, Law in Society : Freedom of Contract.
61. Simpson, A.W.B., (1975), A History of the Common Law of Contract.
62. Singhal & Subbaramanium, (1999), 4th Edition, Vol. I and II, Indian Contract Act, The Law Book Company.
63. Sujan, M.A., (2001), 2nd Edition, Frustration of Contract, Universal Law Publishing Co. Pvt. Limited.
64. Sujan, M.A., (2001), 2nd Edition, Interpretation of Contract, Universal Law Publishing Co. Pvt. Limited.
65. Sujan, M.A., (2001), 2nd Edition, Theories of Contract, Universal Law Publishing Co. Pvt. Limited.
66. Sutton and Shannon on Contracts.
67. Swan & Reiter, *Contracts: Cases, Notes and Materials* 2- 55 (1978).
68. Thomas Erskin Holland, Jurisprudence.
69. Uniform Commercial Code.
70. V.G.Ramachandran, 1970 Edition and 1971 Edition, Vol. I, II and III, Law of Contract in India.
71. Venkata Iyer, T S., (1999), 7th Edition, Vol. I and II, The Law of Contracts, Gogia & Company.
72. Venkatarao on Indian Contract Act.
73. William H. Schrempher, Law in its Application to Business.
74. Williston on Law of Contract.

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LIST OF ARTICLES AND WRITE UP REFERRED

1. Amount forfeited for breach of contract to be included or excluded in a suit for damages ? by R.Thillai Villlalan.
2. Damages for breach of contract under international commercial law, requirement of reasonableness of damages, by Rodney D. Ryder.
3. Damages for intangible loss for breaches of contract, by K.V.S. Sharma.
4. Death of damages : A dichotomy by I.C.Saxena.
5. Deposit Forfeiture : A comparative legal perspective by I.C. Saxena.
6. Exclusion of contractual liabilities and damages – A critical analysis by Arvinder Singh Dalal.
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8. Lawyer
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10. Liquidated damages and Penalty, by P.M. Bakshi.
11. Liquidated damages and Penalty, Clauses in commercial contracts, by B.K. Gupta.
12. Recovery of damages – Powers unfettered.
13. Remoteness of Damages and judicial discretion in India, by M.M. Alam and Iqbal Jawed.
14. Remoteness of Damages and judicial discretion in India, by Nusrart Altaf.
15. The doctrine of fundamental breach and attempted formulation, by T.N. Shala.

LIST OF LAW JOURNALS REFERRED

1. AIR Supreme Court Weekly
2. All England Report
3. All India High Court Cases
4. All India Reporter
5. Bombay High Court Reports
6. Bombay Law Reporter
7. Bombay Law Times
8. Business Law Journal
9. Business Law Report
10. Calcutta Weekly Notes
11. Commonwealth Law Reports
12. Gujarat High Court Judgments
13. Gujarat Law Herald
14. Gujarat Law Reporter
15. Gujarat Law Times
16. Gujarat State Current Statutes
17. Harvard Law Review
18. Indian Judicial Reports
19. Indian Law Report, Allahabad
20. Indian Law Report, Andhra Pradesh
21. Indian Law Report, Assam
22. Indian Law Report, Bombay
23. Indian Law Report, Calcutta
24. Indian Law Report, Cuttack
25. Indian Law Report, Delhi
26. Indian Law Report, Gujarat
27. Indian Law Report, Himachal Pradesh
28. Indian Law Report, Kerala
29. Indian Law Report, Lahore
30. Indian Law Report, Lucknow

31. Indian Law Report, Madhya Pradesh
32. Indian Law Report, Madras
33. Indian Law Report, Myssore (Karnatak)
34. Indian Law Report, Nagpur
35. Indian Law Report, Patna
36. Indian Law Report, Punjab
37. Indian Law Report, Punjab and Haryana
38. Indian Law Report, Rajasthan
39. Indian Law Report, Rangoon (High Court, Rangoon)
40. Jammu and Kashmir Law Reports
41. Journal of Business Law
42. Journal of Indian Law Institute
43. Judgment Today
44. Judicial Review
45. Kerala Law Times
46. Madras Law Journal
47. Madras Law Weekly Notes
48. Manupatra
49. Mercantile Law Reporter
50. Modern Law Review
51. Popular Jurist
52. Saurashtra Law Reporter
53. Scale
54. Simla Law Journal
55. Supreme Court and Exchequer Court
56. Supreme Court Cases Journal
57. Supreme Court Decisions
58. Supreme Court Journal
59. Supreme Court Notes
60. Supreme Court Reports
61. Supreme Today
62. Unreported Judgments
63. Weekly Reporter-Appellate High Court
64. Yale Law Journal

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LIST OF WEB-SITES VISITED DURING THE STUDY

1. www.squire.law.cam.ac.uk
2. www.findlaw.com
3. www.website-law.co.uk
4. www.leeds.ac.uk/law/hamlyn/intro.htm
5. www.loc.gov/law/guide/india.html
6. en.wikipedia.org/wiki/Law_report
7. law.lexisnexis.com
8. awcommissionofindia.nic.in
9. www.indlaw.com
10. www.llrx.com
11. www.legalserviceindia.com
12. www.londonexternal.ac.uk
13. www.lawsociety.org.uk
14. www.amazon.com
15. www.washlaw.edu/forint/europe/uk.html
16. www.lib.uwo.ca
17. www.lawcomm.gov.je/Contract.htm
18. www.out-law.com
19. www.lawrights.co.uk/
20. www.hierosgamos.org
21. www.singaporelaw.sg/content/ContractLaw.html
22. www.oup.com
23. www.landlordzone.co.uk
24. www.soton.ac.uk
25. judis.nic.in/supremecourt/chejudis.asp
26. library.law.wisc.edu
27. caselaw.lp.findlaw.com
28. www.linksandlaw.com/news.htm
29. www.law.nyu.edu/library/foreign_intl/england.html

30. www.mljlibrary.com/site_map/site-map--madras-law-journal.php
31. www.lexisinfotech.com/
32. www.carrow.com/linkindia.html
33. www.scconline.com/
34. www.buckingham.ac.uk
35. www.acumenlegal.com

`L'

LIST OF WEB SITES OF ALL HIGH COURTS IN INDIA VISITED DURING THE STUDY

1. www.indiancourts.nic.in/
2. hc.ap.nic.in
3. bombayhighcourt.nic.in/
4. calcuttahighcourt.nic.in/
5. highcourt.cg.gov.in
6. delhihighcourt.nic.in/
7. gujarathighcourt.nic.in
8. ghconline.nic.in/
9. hphighcourt.nic.in/
10. ghconline.gov.in/imphal.html
11. jkhighcourt.nic.in/
12. jharkhandhighcourt.nic.in/
13. highcourtofkerala.nic.in/
14. mphighcourt.nic.in/
15. patnahighcourt.bih.nic.in/
16. highcourt.chd.nic.in/newhcpage/default.htm
17. hcraj.nic.in
18. www.indianlawcds.com/legal_links.html
19. www.courtsjudgments.com/terms.shtml
20. www.judgments-online.com

ABBREVIATIONS

AIR (SCW)	-	AIR Supreme Court Weekly
AIR	-	All India Reporter
All ER	-	All England Report
BLJ	-	Business Law Journal
BLR	-	Bombay Law Report
BLT	-	Bombay Law Times
CLR	-	Commonwealth Law Reports
CWN	-	Calcutta Weekly Notes
Exch.	-	Exchequer's Court
GHJ	-	Gujarat High Court Judgments
GLH	-	Gujarat Law Herald
GLR	-	Gujarat Law Report
GLT	-	Gujarat Law Times
HLR	-	Harvard Law Review
ILR	-	Indian Law Report
ILR, All	-	Indian Law Report, Allahabad
ILR, AP	-	Indian Law Report, Andhra Pradesh
ILR, Assam	-	Indian Law Report, Assam
ILR, Bom.	-	Indian Law Report, Bombay
ILR, Cal.	-	Indian Law Report, Calcutta
ILR, Cuttack	-	Indian Law Report, Cuttack
ILR, Del.	-	Indian Law Report, Delhi
ILR, Guj.	-	Indian Law Report, Gujarat
ILR, HP	-	Indian Law Report, Himachal Pradesh
ILR, Kar.	-	Indian Law Report, Myssore (Karnataka)
ILR, Ker.	-	Indian Law Report, Kerala
ILR, Lah.	-	Indian Law Report, Lahore
ILR, Luk	-	Indian Law Report, Lucknow
ILR, Mad.	-	Indian Law Report, Madras

ILR, MP	-	Indian Law Report, Madhya Pradesh
ILR, Nagpur	-	Indian Law Report, Nagpur
ILR, P&H	-	Indian Law Report, Punjab and Haryana
ILR, Patna	-	Indian Law Report, Patna
ILR, Pun.	-	Indian Law Report, Punjab
ILR, Raj.	-	Indian Law Report, Rajasthan
ILR, Rang.	-	Indian Law Report, Rangoon (Rangoon)
J&KLR	-	Jammu and Kashmir Law Reports
JILI	-	Journal of Indian Law Institute
JR	-	Judicial Review
JT	-	Judgment Today
K.B.	-	King's Bench
KLT	-	Kerala Law Times
Lawyer	-	Lawyer
Manupatra	-	Manupatra
MLJ	-	Madras Law Journal
MLR	-	Mercantile Law Report
MLR	-	Modern Law Review
MLW (Notes)	-	Madras Law Weekly Notes
M.R.	-	Master of Rolls
P.C.	-	Privy Council
Q.B.	-	Queen's Bench
Scale	-	Scale
SCC	-	Supreme Court Cases Journal
SCD	-	Supreme Court Decisions
SCEC	-	Supreme Court and Exchequer Court
SCJ	-	Supreme Court Journal
SCR	-	Supreme Court Reports
SLJ	-	Simla Law Journal
SLR	-	Saurashtra Law Report
ST	-	Supreme Today
UJ	-	Unreported Judgments
WLR	-	World Law Report
YLJ	-	Yale Law Journal

CHAPTER - I

1.1 INTRODUCTION:

If we refer to the most famous mythological epic "*Ramayana*", it says, "*Raghukul reet sada chali aayi, pran jaye par vachan na jaye*".[1] '*Vachan*' that is '*promise*' to perform, is considered not only a part of duty but the '*Dharma*'.

But gradually with day by day development and growth of economic and commercial aspects, the human being became greedy. He started thinking about his own profit and loss in all the matters of life. Even if the promise was made by his own self in the past, the party to the promise started taking shelter under different heads and starting giving different excuses for non-performance or non-fulfillment of the promise and this is how the concept of breach of contract comes into existence. In the ancient time, oral or verbal exchange of words was considered to be sacred commitment or promise. It had its own binding nature even without anything made in writing.

Why should promise be enforced? To this question various answers have been given. The simplest answer is that of intuitionists, namely, the promises are sacred perse, that there is something inherently despicable about not keeping a promise and that a properly organized society should not tolerate this. Popular sentiment generally favors the enforcement of those promises, which involve some quid pro quo (equivalent thereof). In this common law Justice

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[1] "*Chopai*" from Hindu Mythological Epic "*Ramayana*".

Holmes expressed the view that a contract is properly to be regarded as the taking of a risk creating liability to pay damages in a certain event. Professor Goodhard, who was a protagonist of moral theory, said “that the moral basis of the contract is that the promisor has by his promise created a reasonable expectation that it shall be kept.”

The concept of ‘*morality*’ and ‘*Dharma*’ was given complete go-by in the new era. So in those circumstances, it became very difficult for the system to maintain the law and order situation in the commercial transactions. The only option in that situation left with the system i.e. to the framers of law, juries, Judges and other decision making authorities was to make individual understand how to honour and how to abide by his own words which is in the nature of a commitment within the four corners of law and to make the individual understand if, he is not at all ready and willing to fulfill or perform his own commitment, then, to bear the bitter fruits and circumstances arising out of it. This is how the codification of the Contract Act comes into picture even for the promise which is being made by one party to the another, which is always a subject matter of two parties; performance of which always gives *a right in personam and not right in ram.*

In its slow and steady growth, the law relating to “Damages For Breach of Contract” goes deeper and deeper into the social, economical and legal problems. The main focus of this thesis is to show how the different Courts, in England as well as in India, availed the opportunity to develop the systematic law for Damages for Breach of Contract.

- **Requirement to develop the concept of Damages for Breach of Contract:**

The law was never static, is never static and will never be allowed to be static. It is always dynamic in nature and always subject to change from time to time. The object or purpose to develop the systematic law of damages for breach of contract is, whether personnel or public must be to sustain the stability of the society and help its progress. In Manu's script, it is famously said in Sanskrit, "*Dharnadarm Mitya Hoon, Dhami Dharayate Pragnah*".[2] Meaning thereby, the structure of any society, which wants to be strong, homogeneous and progressive, must, know about, being steady but not static; stable but not stationary. The revision of law is must in a dynamic society like ours, which is engaged on the adventure of creating founded on faith in the value system of social economic justice.

- **The action for breach of promise:**

It was abandoned in the early sixteenth century in a series of cases' culminating in *Pickering v Thoroughgood*,[3] for reasons which are still not wholly clear, but may owe something to rivalry with Chancery or to the church courts. Spelman J. in that case said:

> "And in some books a difference has been taken between nonfeasance and malfeasance; thus on the one an action of covenant lies, and on the other an action on the case lies. This is no distinction in reason, for if a carpenter for £1 00 covenants with me to make me a house, and does not make it before the

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2 Manu's Script.

3 *Pickering v Thoroughgood,* (1533) 8.

> day assigned, so that I am deprived of lodging, I shall have an action for this nonfeasance just as well as if he had made it badly."

This was a momentous development, for the common law now had a form of action whereby in principle any undertaking could be sued upon; the action had become an action for breach of promise, and the allegation of an undertaking was indeed commonly coupled with one of a promise. The action could now remedy breach of any informal agreement. It was triable by jury and led to the award of compensatory damages. This new departure gave rise to two problems, which preoccupied the courts in the sixteenth century. The first involved the relationship between assumpsit's and the older forms of action, particularly debt sur contract. The second involved the evolution of a body of doctrine, which would define which promises were actionable, and which not, a doctrine to define the scope of promissory liability.

1.2 COSMOS:

1.2.1 Damages:

Under certain circumstances, a contractual promise may be enforced directly. This may be by an action for the agreed sum, for instance the price it has been agreed would be paid for goods or some other performance, by an order for specific performance of the obligation, or by an injunction to restrain the breach of a negative stipulation in a contract, or to require the defendant to take positive steps to undo a breach of contract. These remedies have different historical roots, the claim for an agreed sum being a common law remedy whereas specific performance and injunctions are

equitable remedies, which were once exclusively administered by the Court of Chancery. At common law the breach of a contract was regarded as the breach of a purely personal obligation but equity would sometimes regard a contract as conferring a proprietary interest on the person to whom property was to be transferred, and even where this was not the case, would come to the aid of the injured party where damages would be, for that party, an inadequate redress. The specific remedies are not subject to the limits imposed on damages; for instance, rules of remoteness and mitigation and a plaintiff may therefore prefer specific relief where these would limit the damages recoverable.

With a breach of contract occurrence the injured or aggrieved party becomes entitled to any of the following remedies:

(1) Rescissions of contract;
(2) Suit for remedies;
(3) Suit upon quantum merit;
(4) Suit for specific performance;
(5) Suit for injunction;
(6) Suit for rectification;
(7) Suit for restitution; and
(8) Suit for cancellation of contract.

1.2.2 Breach:

To understand the entire concept of breach of contract, it becomes necessary to understand the clear meaning of breach. Different renowned dictionaries of the World define the ‘breach’ in the following words:

- "Breach can be a troublesome word. It's most frequent legal use in the phrase breach of contract. The word breach always suggests its more common cognate, break. One can either breach or break a contract; and another may refer to one's breach or breaking of it."[4]

- Breach, A violation or infraction of a law or obligation.

  "A breach may be one by non-performance, or by repudiation, or by both. Every breach gives rise to a claim for damages, and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages. If a court chooses to ignore a trifling departure, there is no breach and no claim arises."[5]

- Breach means "The negligent performance of a contractual obligation, to the point of acting outside the contract's terms. Under Louisiana law, active breach of contract is contrasted with passive breach of contract, which is a failure to perform the obligations created by the contract. Unlike a passive breach, an active breach of contract may give rise to claims in contract. Cf. passive breach of contract."[6]

- Breach is "The act of breaking; violation; infringement; now used only figuratively of the violation or neglect

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4 B.A. Garner, *Modern Legal Usage,* 2nd Edn.

5 Restatement (Second) of Contracts * 236 cmt. A (1981).

6 Black's Law Dictionary, 7th Edn.

of a law, contract, or any other obligation, or of a custom." Violation of a duty, or invasion of a right.
The action of breaking:

(1) Failure to perform duties under a contract.
(2) Failure to use reasonable care in a negligence situation.[7]

- Breach is basically "An act of breaking, especially breaking of a law or promise, etc. or a failure to fulfill or carry out a duty, promise, etc., or to break (a promise etc.) or fail to carry out (a duty or commitment, etc.)[8]

Thus, Breach of contract means violation of a contractual obligation, either by failing to perform one's own promise or by interfering with another party's performance.

1.2.3 Contract:

- **Contract: an accordion word**

Contract is an accordion word and is conditioned at any time by the tune society sets for it. The law of Contract is the product of inter-action of politics and economics and hence, the necessity of study of history for proper appreciation of the development of the law. In the words of Hon'ble Mr. Justice Bhagwati, when he was Judge of the High Court of Gujarat, in *Lalbhai Dalpatbhai and Co., M/S*

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7 P.R. Aiyer, (2005), 3rd Edn., Vol.1, *Advanced Law Laxicon.*
8 21st Century Dictionary.

v. Chittranjan Chandulal Pandya,[9]: "We must remember that the law must adapt itself to the changing needs of the society and wherever it is possible, we must not hesitate to adopt new principles or, otherwise, law will become 'antiquated straight-jacket and a dead letter' and 'the judicial hand would stiffen in mortmain"'.

It would be necessary in order to have a panoramic view of the development of the concept of contract to go over the history of that development through the ages in different countries. Whether our quest takes us to the East or the West, the ancient or the modem times, whether we go to Hindu Contract, Roman Contract, British Contract, its continental counterpart or American cousin, we find that the underlying essential idea of a contract is offer and acceptance.

- **Concept of contract: Hindu Law**

It would be interesting to trace the history of the concept of contract from the ancient times to the present day to get a panoramic view of the development.

In ancient India, during the *Chandragupta's* period the Hindu concept of contract was a bilateral transaction between two individuals or group of individuals constituting legal entities, the essential element of which was free consent and consensus on all material terms and conditions. It was an open contract, openly arrived at. It was laid down that the following contracts were void: -

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9 *Lalbhai Dalpatbhai and Co., M/S v. Chittranjan Chandulal Pandya,* AIR 1966 Gujarat 189.

(i) Contract formed during the night;
(ii) Contract entered into the interior compartment of a house;
(iii) Contract made in a forest; or
(iv) Contract made in any other secret place.

The law frowned on clandestine contract but certain exceptions were made which are listed below:

(i) Contract made to ward off violence, attack and affray;
(ii) Contract made in connection with the celebration of marriage;
(iii) Contract made under orders of Government;
(iv) Contract made by *purdanashin* women; or
(v) Contract made by traders, hunters, spies and others who have to roam in the forest frequently.

The contract was a defensible concept, rendered void if there was any undue influence or if contract was entered into a fit of anger or under influence of intoxication, etc. Again, though as a general proposition contracts made during the night were void, exceptions were made in the following cases:-

(i) Contract relating to a heavy debt (as publication of such an event would lower the person concerned in the estimation of others);
(ii) Contract, object of which could not be expressed and brought to the notice of others owing to delicacy attaching thereto, e.g., a contract between a concubine and her paramour (concubine was recognised as a fact of life and therefore contract regarding the same given validity).

➢ Concept of contract: Mohammedan Law

During the Mohammedan rule, the Mohammedan Law of Contract governed all the subjects, in matters of contract. The word contract in Arabic is '*Aqd'* meaning a conjunction. It connotes conjunction of proposal (*Ijab*) and acceptance (*Qabul*). As succinctly summarised by Abdur Rahim,: "In other words, a contract requires that there should be two parties to it, that one party should make a proposal and the other accept it, that the minds of both must agree, that is, their declaration must relate to the same matter and the object of the contract must be to produce a legal result".[10]

➢ Concept of contract: Indian Contract Act[11]

With the advent of the British Rule, the Hindus who during the Mohammedan rule were subject to the Muslim Law of Contract, had a revival of their own laws consequent on the regulations and charters granted by the British Crown to the East India Company. The Hindu concept of the law was more particularly revived in the *Saddar* and *Mofussil* courts. The revival of Hindu law and the application of Mohammedan law to Muslims, brought in new problems. The need for a unified code applicable to all was felt to be a necessity. This eventually led to the enactment of the Indian Contract Act of 1872 based on the Common Law of Contract obtained in U.K. Indian Contract Act, 1872 defines, in

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10 Abdur Rahim, *Mohammedan Jurisprudence,* p. 282.

11 Indian Contract Act, 1872 (Act 9 of 1872) comes into force from 01/09/1872.

section 2(h), a contract as an agreement enforceable by law. This again takes us to the definition of agreement contained in section 2(e) of the Indian Contract Act. "Every promise and every set of promises forming the consideration for each other is an agreement." This raises two questions: what is a promise and what is consideration? A promise, as defined by section 2(b) of the Indian Contract Act, is "a proposal when accepted". This again raises two questions: what is a proposal and what is acceptance? section 2(a) of the Indian Contract Act defines a proposal as "when one person signifies to other his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such acts or abstinence, he is said to make a proposal". Section 2(b) of the Indian Contract Act defines acceptance as, "when the person to whom the proposal is made signifies his assent thereto, -the proposal is said to be accepted". Section 2(c) of the Indian Contract Act further defines promisor and promisee in the following terms: "The person making the proposal is called the promisor and the person accepting the proposal is called the promisee". Consideration, as defined by section 8(d) of the Indian Contract Act, is, "when at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing something, such act or abstinence or promise is called consideration for the promise".

1.2.4 Breach of contract:

If one of two parties to a contract breaks an obligation, which the contract imposes, a new obligation will in every case arise, that is, an obligation to pay damages to the other party in respect of any loss or damage sustained by the breach. Besides this, there are circumstances under

which the breach not only gives rise to a right of action for damages but also gives the innocent party the right to decide not to render further performance under the contract and to be discharged from its obligations.

However, not every breach of contract operates as a discharge. In order to have this effect the breach must be such as to constitute repudiation by the party in default of its obligations under the contract.

It is common to speak of the contract as having been 'discharged by the breach'. The phrase, though convenient, is not strictly accurate. A breach does not, of itself, effect a discharge; what it may do is to justify the innocent party, if that party so chooses, in regarding itself as absolved or discharged from further performance of the contract. It does not automatically terminate the innocent party's obligation since that party has the option either to treat the contract as still continuing or to regard itself as discharged by reason of the repudiation of the contract by the other party. An acceptance of repudiation must be clear and unequivocal. Once the option is exercised to either keep the contract on foot or terminate it, the decision is not revocable. A fresh option may arise, however, if the repudiation continues or there is another separate repudiatory breach.

In principle an innocent party who does not 'accept' the repudiation is entitled to continue to insist on performance because the contract remains in full effect. The appellant, an advertising contractor, agreed with the respondent, a garage proprietor, to display advertisements for his garage for 3 years. On the same day, the respondent refused to perform the agreement and requested the appellant to

cancel the contract. The appellant refused to do so, and elected to treat the contract as still continuing. It made no effort to re-let the space, displayed advertisements as agreed, and sued for the full amount due.

It was contended on behalf of the respondent that, since he had renounced the agreement before anything had been done under it, the appellant was not entitled to carry out the agreement and sue for the price: its remedy, if any, lay in damages. A bare majority of the House of Lords rejected this contention and held that the appellant was entitled to the full contract sum.

1.2.5 Damages for breach of contract:

DAMAGES are the pecuniary compensation, obtainable by success in an action, for a wrong which is a breach of contract, the compensation being in the form of a lump sum awarded at one time; unconditionally and generally, but not necessarily, expressed in English currency.

This definition covers the usual and strictly correct meaning of the term "damages" and excludes claims for money other than those which are for compensation for a breach of contract." Accordingly there are four types of case in which pecuniary satisfaction is gained by success in an action and which are yet outside the present definition: actions for money payable by the terms of a contract, actions in restitution formerly quasi-contract, actions in equity and actions under statutes where the equitable or statutory right to recover is independent of any or breach of contract.

Damages should in general be restricted to compensation for loss. That is what damages are all about-damages are

for damage in English law, *damnum* in Roman law, *dommage* or *dommage-interets* in French law. Unjust enrichment covers the situation where the defendant is enriched but nothing is taken from the plaintiff and it is misguided to talk of damages where the key to unlock the remedy remains not any loss to the plaintiff for which damages could properly be awarded but the enrichment of the defendant which must be reversed. The appropriate place for these cases is within the law of restitution, not within the law of damages. Actions claiming money under statutes, where the claim is made independently of a wrong, which is a breach of contract, is not an action for damages.

1.3 AIM OF STUDY:

Law relating to damages for breach of contract makes vicinity constituting of a segment in the area of remedies for breach of contract. Normally a contract, unless performed, stands terminated either by deliberate or negligent act of one of the parties to the contract or by automatic dissolution due to supervening circumstances occurring irrespective of violation of the promise by the party which makes performance of the contract himself. For proper study of this branch of law, it is necessary to have a clear concept of contract through the ages with a particular reference to the doctrine of two parties – sacred – sacrosanct – binding on them as a piece of private legislation. They were at liberty to enter into contract they like, unless forbidden by law. The Court could only interpret the contract. The Court could not make or modify the contract. The Court could only enforce the contract. The Court could not grant dispensation from the obligation imposed by the contract.

There was a time in the nineteenth century when the doctrine of laissez-faire prevailed. The economic freedom spelt free market. In that age equal bargaining power was the order of the day but now inequality of bargaining power is a recognised fact. Courts have assumed powers to give relief against the unjust results of such a contract. Courts have accepted the fact that supervening events cannot all be foreseeable and therefore cannot be provided for. Contract is a transaction of sharing of risks fairly and squarely between the parties. While bargaining for their "respective position in sharing of risk, a certain situation or state of thing is assumed by the parties to continue during the operation of the contract, but if due to no fault of the either party, the supervening circumstances have the effect of destroying this foundation of the contract, the result would be that the contract from that point of time becomes radically different and stands frustrated.

Study of development of breach of contract would reveal that different theories have been evolved to explain and propound the theories of breach of contract, whatever theory, whatever the principle, which may find acceptance, the effect is the same. The academicians may differ, the Judges may find varying supporting reasons but the conclusion is the same and very practical point of view, the effect is the same i.e. breach is committed in contract.

Here the questions arise, do the parties owe each other or duty to negotiate in good faith? Do the parties once the contract is concluded owe each other a duty to perform the contract in good faith? Until recent English lawyers would not have asked themselves these questions or, if asked would have dismissed them with a cursory “of course no”. on being told that the Italic Civil Code provides for duty to

negotiate in good faith or the German Civil Code means a duty to perform a contract in good faith, a thoughtful English lawyer might have responded by suggesting that the practical problems covered by this Code positions were often covered in the English law but in different ways, and as it is covered under English law, it is presumed that it must have been adopted as a part and parcel in the Indian Contract Act, 1872. This may still be regarded as an orthodox position but the lecturer of English law has began to consider it more carefully whether there might not be merit in explicitly recognizing the advantages of imposing good faith duties on negotiations and performance. There is an underlying principle of good faith in the law of contract. Although it is difficult to find a clean and comprehensive statement of it and in the case of failure to perform, the different remedies are provided for breach of contract. The claim for damages for breach of contract is one of the very important and widely used remedies amongst all the other remedies. The damages being one of the remedies for breach of contract has its own study in the eye of law.

We are here mainly concerned with the practical steps, which an innocent party may take if the other party breaks the contract. It should be noted, however, that in the law of contract, unlike some other branches of the law, rights and remedies are inextricably intertwined. So we have already seen, that if a party is induced to enter into a contract by the other party's misrepresentation, he can rescind and similarly that serious failure by one party to perform may entitle the other to withhold his own performance and or to terminate the con tract. Rescission, withholding one's performance and termination are all in one sense rights but equally they are often the most effective way of remedying the breach.

We may make some other preliminary points. It is common, even for lawyers, to talk of 'enforcing the contract'. In fact English law does not usually enforce the contract in the sense of compelling the parties to carry out their primary obligations. At common law the only case is where the guilty party's outstanding obligation is to pay a fixed sum of money; in equity there exist the remedies of specific performance and injunction but these, as we shall see, are only exceptionally granted. In practice, the injured party's remedy is most commonly an action for damages to compensate him for the breach of contract.

It is important finally to notice that the parties enjoy a wide freedom not only to provide for their primary rights but also to plan their own remedies. In contracts of any sophistication it is very common for the parties to insert, provisions, which either add to or subtract from the remedies that the general law would otherwise provide. Even in relatively simple contracts it may make an excellent sense to contract for a remedy, which will avoid the need to go to court.

It sounds reasonably easy to decide under which head remedy is to be claimed for breach of contract, but such a simple question gives rise to lot many complicated issues to be answered by the parties, likewise:

After deciding the major question that under what head the remedy is to be claimed if the aggrieved party comes to a conclusion that it would be claimed under the head called “damages for breach of contract”, following questions arise for consideration before a party who wants to claim damages, such as:

- On what ground the damages can be claimed?
- Such damages are to be claimed from whom?
- What would be the amount of damages to be claimed?
- What amount can be termed as reasonable and fair amount of damages to be granted by the Court?
- Whether the damages are merely a compensation or penalty?
- Whether the aggrieved party claiming damages for breach of contract can be allowed to make profit out of it?
- What is the concept of remoteness of damages?
- What can be the reasonable quantum of damages?

1.4 SCOPE AND OBJECT OF STUDY:

This study revolves around the decisions taken by the English Courts, the Privy Council, the Court of Appeals, the Chancery Division, exchequer court, the Hon'ble Supreme Court of India, Hon'ble High Court of Gujarat and Hon'ble High Courts of all other States in India in the development of law of damages for breach of contract.

Hypothesis of the researcher has set up a focused for research is, "How effective is the legislative and judicial controlling in the area of awarding damages for the breach of contract?" "How the concept of law of damages is developed step by step by eminent Judges through their judicial decisions?

This study would reveal that the hypothesis is focused on how far the decisions, comments, judicial pronouncements and intervention of the English Courts, the Privy Council, the Court of Appeals, the Chancery Division, the Hon'ble

Supreme Court of India, Hon'ble High Court of Gujarat and other Hon'ble High Courts of all other States in India, have helped in developing the law of damages for breach of contract. This study is justifying the hypothesis as the legislations are also helping the judiciary to decide new challenges brought before them to decide.

1.5 HYPOTHESIS:

The main object behind the present research exercise is to bring analytical and comparative focus on the decided cases, which have developed law of damages for breach of contract in England as well as in India.

In the developing society like that of India, the Court has discharged rare and responsible function of –

(1) Balancing and computing the claim of damages as well as assuring unhampered development of commercial transaction;
(2) To undertake where and when necessary to exercise judicial interference in commercial transaction;

It has been the endeavor of the present researcher to place on record how far the English Courts, the Privy Council, the Court of Appeals, the Chancery Division, Exchequer court, the Hon'ble Supreme Court of India, Hon'ble High Court of Gujarat and Hon'ble High Courts of all other States in India, have succeeded in their task in giving a loud and clear voice to the law of damages to the breach of contract.

- Whether the efforts of all these Hon'ble institutions arrived at a success?
- Upto what extent these efforts have been successful?

- Whether the efforts have not resulted into ultimate success?
- Whether there are loopholes in the present litigation or whether enforcement of law is weak?
- How do we make the entire procedure to claim damages for breach of contract smooth, simple, stable and steady to provide the ultimate justice to the aggrieved party?

The research scholar to find out the answers of aforesaid questions pose to her own self undergoes the entire research exercise.

1.6 RESEARCH DESIGN:

The study undertaken is, of course, on vast Compass i.e. analytical and comparative study of decisions of English Courts as well as Indian Courts on the subject of law of damages for breach of contracts. The method adopted by the researcher is both analytical as well as critical. It is mainly doctrinal, reportive study. The method used for carrying out this research work is based on a systematic desk review of all the relevant literature available related to the subject i.e. damages for breach of contract. In carrying out the above task of analytical study and research all available literature on the topic under focus based on case-law material, legislation and articles evolved. The writings of the jurists have been perused. The greater emphasis, undoubtedly during this analytical study, is on case-law developed by the English Courts, the Privy Council, the Court of Appeals, the Chancery Division, the Hon'ble Supreme Court of India, Hon'ble High Court of Gujarat and other Hon'ble High Courts of all other States in India.

Thus, it has been a doctrinarian research approach combined with limited empirical study descriptive, evaluative, critical, explanatory study, which includes the following:

(I) Recognise the problem.
(II) Identify and define the problem.
(III) Formulate a problem hypothesis, deduce consequences and define basic terms and variables.

1.7 SOURCES:

The sources, on which the entire research work is based, can broadly be divided into two categories:
(I) Primary Sources;
(II) Secondary Sources.

- **Primary Sources:**

The researcher has mainly relied upon the articles and reports written by the eminent Jurists and legal experts, decided case laws of England and Indian Courts as well as all the possible information available on the Web-sites for analytical and comparative study of judicial trend in India and England on the subject of damages for breach of contract. A detailed list of the same is given in the Bibliography.

- **Secondary Sources:**

Books written by eminent authors of both the countries i.e. England and India, Law Journals published by the authorized publication houses of England and India, are relied upon as a secondary source of research. A detailed

list of the secondary source is also given in the Bibliography.

1.8 BREAK-UP OF THE STUDY: CHAPTERISATION:

The introductory chapter deals with the revolutionary cycles. The plan and the methodology employed in the present study are also dealt with in this chapter.

It would be important to advert to the conditions which would permit a person to claim damages or claim compensation which would take within it sweep liability for damages, measure of damages, proof of damages and remote and indirect loss so as to claim specific damages. However, before damages can be measured, it would be important to understand the legal rights, which are conferred on a person. The purview of Section - 73 and 74 of the Indian Contract Act would have to be analysed. What would amount to breach of contract, which would permit a person to claim damages may be liquidated or unliquidated. Damages come into picture only when a contract has been broken and breach of contract is proved before posing the question about damages. No damages can be awarded by the Court without coming to concrete conclusion about breach being committed, merely on the ground that defendant has been profited by the contract. Chapter-II exclusively deals with concept of breach of contract.

Having considered the importance of concept of breach of contract and discussion made on it, it becomes necessary to discuss the basic doctrine of frustration of contract. The said concept is discussed in Chapter-III where the entire

performance of contract becomes substantially impossible without any fault on either side or any malafide intention on either party; the contract is prima facie dissolved by the doctrine of frustration.

Chapter-IV gives an idea about how development of the doctrine of frustration of contract is made by various modes i.e. by making enactments by delivering different judgments on the said issue by the competent Court of law in England and India as well. What would be the rights and liabilities of the parties to frustrated contracts? And how these rights and liabilities are decided and day-by-day developed by the judicial pronouncement is the crux of this chapter.

The basic foundation of every action of damages in the case of contract is a result or outcome of breach of contract. It is but obvious that such breach of contract is one of them. Therefore, whenever a breach of contract is proved all the cases made out that the breach is committed, law infers some damages to the plaintiff and according to the maxim *ubi jus ibi remedium* the common law of England as well as India considers that there is no wrong without a remedy and the remedy is by way of an action for damages, is one of the most important and widely accepted remedy amongst the others. Chapter-V gives an idea about foundation of liability for breach of contract.

Any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another is entitled to a pecuniary compensation or indemnity. Any person who is a sufferer may recover such compensation or indemnity in

the Courts. Chapter-VI is an attempt to throw some light on origin and history of term damages.

Chapter-VII deals with the term damages, its definition and the object for awarding damages for the breach of contract. The rule of law governing damages is also dealt with, statutory law applicable in India and England. The chapter deals with the judicial pronouncements in pre-independence India and post-independence India and a comparative study between the decisions of courts of England and decisions of Indian Courts. The damages are specified into different kinds and dealt with in extensor. The chapter throws light on the researcher's ideas on the comparative study of term damages and the rule to grant damages and the chapter is prelude to chapter on discussion on remoteness of contract as propounded by the English Court in *Hadley v. Baxendal*.[12]

Chapter-VIII gives an attempt to give an idea about development of general rule for providing compensation for breach of contract. The scope of measure of damages in action on Contract is basically very limited. The Jury or the decision making authority or those standing in the place of jury have to decide the measure of damages for breach of Contract within its four corner. While deciding the damages, the decision making authority has not to traverse any vague fields. Basically the damages are never "at large in action on Contract". The injury sustained by the promisee can in almost every case, be very nearly measured by a pecuniary standard, and satisfaction rendered with a near approach to completeness. One can

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[12] *Hadley v. Baxendale*, (1854) 9 Ex. 341.

say that damages in actions on Contract are only compensation, not the profit making issue. But the difficulty is even this is frequently inadequate because the Law has set its own limits upon the theory of compensation.

Chapter-IX mainly gives an idea about different types or kinds of damages. After deciding the nature of damages, it becomes reasonably easy or affordable for the Juries, Courts or decision making authorities to award damage under the head of a particular type or kind of damage. The damages of following all the different types are recognized and awarded as well by the England and native Courts. More or less, the all types of damages are divided into the following four broad categories:

(a) General Damages.
(b) Special Damages.
(c) Nominal Damages.
(d) Exemplary Damages.

Chapter-X exclusively deals with the concept of liquidated damages and penalty. Whether the agreed sum is recoverable from the party in breach depends upon whether it constitutes liquidated damages, when it is recoverable, or a penalty, when it is not. The law as to liquidated damages and penalties has a long involved history, and a brief account of the development over the centuries is necessary for a full understanding of the modern law.

It has been stated in one of the previous chapters that the damages is considered too remote, if despite the wrongful act of the defendant, the plaintiff by failing to use

reasonable care to avoid, allows himself to suffer the damage by his own negligence or indifference to the consequence. In an action on contract, the damages, which an injured person is entitled to recover, must result directly from the wrongful act and no claim can be made to damages, which are only remotely connected with it. The basic principle underlying this rule will, therefore, be found in the maxim *in jure non remota causa ed proxima spectatur.* Chapter-XI gives an idea about quantum of damages.

Chapter-XII deals with the finding and researcher's assessment and recommendations as well as concluding remarks and the suggestions.

Critical and analytical study of decisions, their drawbacks and the legislative drawbacks are discussed in the above chapters. All the aforesaid chapters give an exhaustive and comparative analysis as well as critical analysis, judicial trends on the subject and suggestions for future study to be undertaken.

CHAPTER - II

BREACH OF CONTRACT

2.1 INTRODUCTION:

Before discussing the genesis of the term damages, it would be now important to advert to the conditions which would permit a person to claim damages or claim compensation which would take within it sweep liability for damages, measure of damages, proof of damages and remote and indirect loss so as to claim specific damages. However, before damages can be measured, it would be important to understand the legal rights, which are conferred on a person. The purview of Section - 73 and 74 of the Indian Contract Act would have to be analysed. What would amount to breach of contract, which would permit a person to claim damages may be liquidated or unliquidated. Here, construction of contract would be very important for our purpose.

In India, it is an admitted position of law as legislated by provisions of Section 3 to 8 of the Indian Contract Act that a contract is concluded when the sequence of offer and acceptance is complete. It is for the courts to spell out with a meticulous sifting of the correspondence, which took place between the parties at the time, the alleged contract said to have been undertaken or concluded or not concluded. The suit for damages would lie only when the contract is concluded out of free will of the parties. The parties may enter into contract or conclude the same by their own terms and conditions. Mutual agreement would either absolve the parties or compel the party to do certain

things and if the said term is not performed, the other party would be liable for loss, damages, compensation, delay which may directly or indirectly, arise even for the act of God.[1] The provisions of Sections 23 and 24 of the Indian Contract Act would also be required to be considered as they are necessary for validity of the agreement unless there is an exception clause. The consideration or object of the agreement should always be lawful then only other party would be entitled to damages if the agreement itself is unlawful, the said unlawful consideration would make the entire agreement void as per the provisions of section 64 of the Act. If the unlawful consideration is severable, the lawful portion of such consideration can be acted upon either by specific performance or by claiming damages can be sought from the defaulting party.

Either of the party to the contract will get discharges from the contractual obligation mainly by two ways:

(1) Discharge by performance and
(2) Discharge by breach.

It is easy to see that if one party completely performs what he has promised to do his obligations are at an end. However, important and difficult questions arise as to the effect of something less than perfect performance. From view point of the performer this is a problem in performance but to the other party it will appear as a problem in breach, since usually, a less than perfect performance will be a breach. It seems more convenient; therefore, to consider the problems together, since to a considerable extend one is the mirror image of the other.

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1 *M/s. Basanti Bastralaya v. River Steam Navigation C. Ltd.;* AIR 1987 Cal 271.

The provisions of Section 73 and 74 speak about the compensation for loss or damage caused by breach of contract, and therefore, analyzing these sections, it would be relevant for our study to advert back to what is a contract and when it can be said to have been broken and to further analyse what would constitute breach of such contract. After having understood this concept, it would be relevant what would be the compensation to be paid to such party who has been wronged. This law of damages is further qualified by the term arose in the usual course of thinking from such breach. One more aspect is provided in the Section it self that the parties must be knowing that what would be the loss or damage if such breach occurred and this knowledge is attributed at the time when the contract itself is made. However, the proviso makes it clear that no compensation should be given for remote and indirect loss or damage. Even compensation can be granted for failure of discharging obligations, which would resemble one, which is created by such contract. Therefore, quasi contract are also taken care of.

Before adverting to the principles on which the damages can be granted, it would be important to get a rough idea about the provisions of Section 4 and 5, which deal with the formation of bilateral contract.

A person who had made an offer may withdraw the offer but it has to be withdrawn before the acceptance or even if it is accepted before it was communicated to him. It is cardinal principle that the acceptance should be unconditional and absolute if there is no binding, contract between the parties

or if the acceptance is neither absolute nor unconditional, a party would not be entitled to damages. The next aspect, which has to be looked into for grant of damages, is that the consideration should not be unlawful. The law not only requires consideration but also insists on lawful consideration. The object also must be lawful. Section - 23 makes it clear that a deal which has unlawful consideration is void (illegal). This is also seen that at times, damages have to be asserted if on the basis of terms of contract and if on time, term is essential ingredient.

Section 73 and 74 of the Indian Contract Act, 1872 lays down the principles for assessment of damages where there is a breach of contract. Therefore, ease to these vexes problems, and therefore, it would be necessary to first go through the aspect of breach of contract. The definition of contract will have to be understood and if there is no contract, there can be no breach, therefore, the first aspect for awarding damages would be a concluded contract, and therefore, it would be necessary to deal with the aspect of concluded contract. Thereafter, what would amount to discharge by performance and what would amount to breach of contract, will have to be discussed.

2.2 THE ORDER OF PERFORMANCE AND NON-PERFORMENCE:

Where both parties have obligation to perform, in case of a bilateral contract, question may arise as to who is to perform first. This is preliminary a question of construction of a contract assisted by presumptions as to the normal rule of contracts of a particular kind. Often, it will not be a case of one party performing all his obligations first but rather of someone obligations of one side having to be performed

before related obligations of the other side. So in a contract of employment, the employer's obligations to pay wages will normally be dependent on the servant's has completed a period of employment at the cost of his obligation to provide a safe system of work at the place of employment. It is often helpful to analyse this problem by using the language of conditions. In a contract between *A* and *B*, while discussing about the contract we may explore at least three possibilities:

(I) An undertaking by *A* is a condition precedent to an undertaking by *B*.
(II) Undertaking by *A* and *B* may be concurrent conditions in nature, and
(III) Some undertakings by *A* and *B* may be independent in nature.

From the aforesaid discovery of three different possibilities illustrate the first two possibilities by considering the obligations of buyer and seller as to delivery of goods and payment of price under the contract of sell of goods. The obligation of the seller to deliver and of the buyer to pay price are said to be *prima facie* concurrent, but in many cases varies this rule. In many commercial contracts the seller agrees to grant the buyer normal trade terms, for example, payment within 30 days of delivery of invoice. It is clear that in such a case, the seller must deliver first and cannot demand payment on delivery.[2] Completely contrary to this, in international sells, buyers often agree to pay by opening a banker's commercial credit, and here it is clear that the seller need not to take steps to deliver goods until the buyer has arranged for opening of credit I the

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2 *Total Oil (Great Britain) Ltd. v. Thompson Garages (Biggin Hill) Ltd.,* [1971] 3 All ER 1226.

conformity with the contract.[3] Where the buyer's and seller's obligations are concurrent, this means in practice that the ability to either party to complain of the other's non-performance depends on its own ability to show that he was ready, willing and able to perform.

It is quite common for the some of the obligation of the parties to be quite independent of the performance of obligations by the other party. We have already discussed the employer's duty to provide a safe system of work; an example on the other side would be the servant's duty of fidelity to the master.[4] In the case of such independent covenants the covenantor cannot argue that his obligation is postponed until the covenantee has performed some other obligations.

- **Some decided case laws of non-performance:**

In *Prema v. Mustak Ahmed*,[5] the plaintiff appellant (a Hindu) alleged that the defendant respondent (a Muslim) had made a breach of promise to marry her and claimed Rs. 1,00,000/- as damages. The Trial Court found no such promise by sifting the evidence and non-suited the plaintiff. The High Court disagreed with the appreciation of evidence and held that the defendant-respondent had made a promise to marry and had breached it. The Court approvingly quoted from Anson's Law of Contract.[6]

`Damages for breach of contract are given by way of compensation for suffered, and not by way of punishment

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3 *W.J. Alan & Co. Ltd., v. El Nasr Export and Import Co.* [1972] 2 QB 189 : [1972] 2 All ER 127.

4 *Hivac Ltd. v. Park Royal Scientific Instruments Ltd.,* (1946) CH 169.

5 *Prema v. Mustak Ahmed;* AIR 1987 Guj. 106.

6 Anson's *Law of Contract,* 27th Edition, Oxford University Press.

for wrong inflicted. Hence, the `vindictive' or exemplary' damages of law have no place in the law of contract. To this rule, however, the action for breach of promise of marriage is an exception; in that case injury to the feelings of the disappointed party may be taken into account in the assessment of damages.'

The Court opined that this is the well-settled common law in England, which applies in India also. The Court granted Rs. 60,000/- as damages on the ground of what would be a reasonable sum "commensurate with the social and economic status of the husband and wife in case of desertion of the wife by the husband. This Court measured, would "not have been less than Rs. 500/- per month".

The question that arises is what would be the measurement of damages in a supposed case where the breacher is a female and not a male? Should not the Court, then take into consideration the social conditions in the country and not merely the mental feelings, if any of the male?[7]

Section - 74 of the Indian Contract Act, does not say that compensation can be awarded even though no loss, what so ever, has been caused, for the very concept of award of compensation is to follow the loss or damage that results from a breach of contract. All that Section -74 permits is the award of compensation even where the extent of the actual loss or damage is not proved and gives discretion to the Court to fix the amount.

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[7] See Lucy Carrooll, "The Muslim Women (Protection of Rights on Divorce) Act, 1986: A Retrogressive Precedent of Dubious Constitutionality", 364, 28 *JILI* (1986); also see her views on Indian society and women.

The plaintiff had filed a suit claiming damages to the extent of Rs. 394.40p. for the alleged breach of contract for the sell of sawdust. The defendant was a Forest Contractor and a timber merchant. The defendant had opened the branch office at Murtizapur for the sell of timber and sawdust. In the year 1948, one Gopikisan was appointed as manager of the shop. This Gopikisan entered into the contract with the plaintiff for supplying of 2000 bags of sawdust within four months at the rate of Rs. 1/- per bag. Rs. 250/- was paid to Gopikisan. Gopikisan had delivered only 323 bags of sawdust. Neither he nor the defendant delivered the balance bags to him. The contract stipulated that on breach of contract the defendant would be liable to pay Rs. 1,000/- by way of damages, therefore, the plaintiff claimed the amount with sum of Rs. 102/- which was an excess of the amount which he had paid to Gopikisan over and above the price of 423 bags supplied by him from time to time. The defendant in his written statement denied the claim but admitted that Gopikisan was his servant and had also denied that Gopikisan was manager of the shop or Diwan and he had not any authority to enter into contracts for purchase or sell of goods. Unfortunately for the plaintiff, the Trial Court dismissed the suit but Appellate Court granted a decree for refund of Rs. 102/- and damages for Rs. 394. The Hon'ble High Court has held that the figure specified in the contract was fixed not as a pre-estimate by the parties of the damage, which the plaintiff would suffer by reason of the breach, but in *terrorem*. Where such is the case, it cannot be presumed that the plaintiff must have suffered some damage. Therefore, the plaintiff must prove that he did in fact suffer some damages, though he need not prove the actual extent of the damages. Here the allegation is that the saw dust was to be used for manuring the fields of the plaintiff and that the failure of the defendant to supply the

full quantity of saw dust contracted for resulted in damages to the plaintiff. There is no evidence to show that saw dust is used as a manure nor has one word been said by any one in this case that the use of saw dust gives a better yield of crops than otherwise. It would, therefore, follow that the plaintiff has not shown that he had suffered any damage at all. It can be analytically stated that no doubt Section 74 says that where a sum is stated in the contract as payable to a party if the other party thereof causes a breach, the Court has power to grant compensation to the party even though actual loss or damage is not proved. But that does not mean that compensation can be awarded even though no loss whatsoever has been caused. For the very concept of award of compensation is bound up with loss or damage that result from a breach of contract. All that Section 74 permits is award of compensation even where the extent of the actual loss or damage is not proved and given discretion to the Court to fix the amount. Where, as here, no loss or damage has ensued, there can be no question of awarding compensation. In my opinion, therefore, the plaintiff is not entitled to claim any damages.

In view of the settled legal position enunciated after this judgment, the view that only Rs. 102/- were admissible and that the plaintiff had not suffered any damage and he was not be entitled to damage is bad. The Court has felt that damage can be awarded only when some loss has been caused. The award of compensation is bound up with loss or damage and not based on the aspect of breach of contract. Section 24 permits the compensation where in act of loss or damage is not proved and discretion is given to the Court to award damages.

The Apex Court later in *Union of India v. M/s. Jolly Steel Industries (P) Ltd.*[8] held that the damages for non-delivery was to be fixed on the basis of the price prevailing at the date on which delivery ought to have been made, according to contract. This judgment is based on the landmark judgment given in the case of *Murlidhar Chiranjilal v. Harishchandra Dwarkadas*[9] wherein the Apex Court held that the first principle on which damages in cases of breach of contract are calculated is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it; in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damages which is due to his neglect to take such steps. These two principles also follow from the law as laid down in Section 73 read with the explanation thereof.

2.3 EXCUSES FOR NON-PERFORMANCE:

As per the above discussion, *prima facie* it seems that failure to perform is amount to breach. This is true in majority of cases but at the same time, it is pertinent to recognize that in certain circumstances failure to perform contract as per the agreed terms is excusable. Those excuses in nutshell are as below:

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8 *Union of India v. M/s. Jolly Steel Industries (P) Ltd.,* AIR 1980 SC 1346.

9 *Murlidhar Chiranjilal v. Harishchandra Dwarkadas,* AIR 1962 SC 366.

(1) Agreement:

The parties may have made some agreement or arrangement after the contract was concluded, which permits one party not to perform or to perform in a different way. Such type of agreement can certainly be considered as a valid excuse.

(2) Impossibility of performance and frustration:

Some times, some event takes place after the contract has been made in such a manner that makes performance impossible or commercially sterile. In a limited number of cases, this may have the effect of bringing the contract to an end. This concept has been elaborately discussed in the next chapter of this research work.

(3) Impossibility of performance falling short of discharging frustration:

In some cases, unforeseeable event, although not bringing the contract to an end, may provide an excuse for non-performance, so in most modern contracts of employment, an employer who did not go work because he was suffering influenza would not amount to breach of contract, although the illness would not be sufficiently serious to frustrate the contract.

(4) Contractual excuses for non-performance:

Out side the relatively narrow scope of the last two headings, the common law has been slow to infer that unforeseen developments should relieve a party from prompt and perfect performance. This attitude is commonly

justified on the ground that the parties should make express provision themselves, and this invitation is very often accepted. So for instance, all the standard forms of building and engineering contract contain provisions, which may entitle the contractor to extra time for performance where he has been delayed by such matters as exceptionally adverse weather conditions, or labour disputes. The effectiveness of these clauses may involve consideration of the law as to exemption clauses though it is thought that many of them should be regarded as defining liability rather than excluding it.

(5) Limitation:

In principle, when one party has failed to perform on time, the other party can sue and at this moment the appropriate limitation period will begin to run. At the end of this period the action will normally no longer be maintainable.

2.4 RIGHT TO CLAIM PAYMENT OR PERFORMANCE FROM THE OTHER PARTY WHO DOES NOT PERFORM PERFECTLY:

There is not a slightest whisper of doubt that there are number of cases where it has been stated that a party who does not perform perfectly is not entitled to claim payment or performance from the other party to the contract. Here the researcher wants to make an attempt to vividly illustrate the aforesaid concept by quoting old case of *Cutter v. Powell*.[10]

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[10] *Cutter v. Powell,* (1795) 6 Term Rep 310; *Sinclair v. Vowles,* (1829) 9 B & C 92; *Vigers v. Cook,* [1919] 2 KB 475; Stoljar 34 Can Bar Rev 288.

The defendant agreed to pay Cutter thirty guineas provided that he proceeded, continued and did his duty as second mate in a vessel sailing from Jamaica to Liverpool. The voyage began on 2 August and Cutter died on 20 September when the ship was nineteen days short of Liverpool.

An action by Cutter's widow to recover a proportion of the agreed sum failed, for by the terms of the contract the deceased was obliged to perform a given duty before he could demand payment.

In this case, of course, Mr. Cutter did not break the contract by dying in mid-Atlantic but his right to payment was held to depend on completion of the voyage and the same principle was held to apply in the case of breach in *Sumpter v. Hedges*.[11] In that case the plaintiff, who had agreed to erect upon the defendant's land two houses and stables for £565, did part of the work to the value of about £333 and then abandoned the contract. The defendant himself completed the buildings. It was held that the plaintiff could not recover the value of the work done.

A modern example of this principle is *Bolton v. Mahadeva.*[12]

The plaintiff contracted to install a central heating system in the defendant's house for the sum of £800. He installed the system but it only worked very ineffectively and the defendant refused to pay for it. The Court of Appeal held the plaintiff could recover nothing.

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11 *Sumpter v. Hedges,* [1898] 1 QB 673.

12 *Bolton v. Mahadeva,* [1972] 2 All ER 1322 : [1972] 1 WLR 1009.

It will be seen that in each of these cases, the defendant made an uncovenanted profit, since he obtained part of what the plaintiff had promised to perform without having to pay anything. It is not surprising therefore that these results have been criticized nor that attempts have been made to mitigate or avoid them.

2.4.1 The doctrine of substantial performance:

In the very keen desire to do justice between contracting parties, the courts, have developed the doctrine which popularly known as doctrine of substantial performance. The said doctrine is basically providing a relaxation to the requirement of exact and precise performance of entire contract. In the most famous words of Lord Mansfield while delivering the judgment of *Boone v. Eyre*[13] His Lordship stated that, "If there has been a substantial though not an exact and literal performance by the promisor, the promise cannot treat himself as discharged. Despite a minute and trifling variation from the exact terms by which he is bound, the promisor is permitted to sue on the contract, though he is of course liable in damages for his partial non-performance. According to this doctrine, the question whether entire performance is a condition precedent to any payment is always a question of construction.[14] Thus in *Cutter v. Powell*[15] the court construed the contract to mean that the sailor was to get nothing unless he served as mate during the whole voyage. Again, in a contract to erect buildings or to do work on another's land for a lump sum, the contractor can recover nothing if he abandons operations when only part of the work completed, since his

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13 *Boone v. Eyre,* (1779) 1 Hy B1 273.
14 *Hoenig v Isaacs*, [1952] 2 All ER 176.
15 *Cutter v. Powell,* (1795) 6 Term Rep 310.

breach has gone to the root of the contract. But if, for example, the contractor has completed the erection of the buildings, there has been substantial performance and the other party cannot refuse all payment merely because the work is not in exact accordance with the contract,[16] any more than the employer in *Cutter v. Powell* could have repudiated all liability if on one or two occasions the sailor had failed in his duty as mate.[17]

In the landmark ruling of *Broom v. Davis*[18] it was held that, "So long as there is substantial performance the contractor is entitled to the stipulated price, subject only to cross objection or counter claim for the omissions or defects in execution. If these were not the case and if except performance in literal sense were always require, the tradesman who had contracted to decorate a house according to certain specifications for a lump sum might fine himself in an intolerable position. For instance, if he had put two coats of paint in one room instead of three as agreed as per the terms of contract the owner would be entitled to take the benefit of all that had been done throughout the house without paying a single penny for the work already done."[19]

In that sense the substantial performance doctrine can be regarded as the qualification of rule, rather than an exception to it, and it will be notice that in the case of *Cutter v. Powell, Sumpter v. Hedges and Bolton v. Mahadeva* there was in fact a failure or substantial

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16 *H Dakin & Co. Ltd. v. Lee,* [1916] 1 KB 566.
17 *Hoenig v Isaacs*, [1952] 2 All ER 176.
18 *Broom v. Davis,* [1794] 7 East 480n : *Bolton v. Mahadeva,* [1972] 2 All ER 1322 : [1972] 1 WLR 1009.
19 *Mondel v. Steel* (1841)8 M & W 858 at 870; *H Dakin & Co Ltd. v. Lee* [1916] 1 KB 566.

performance. A significant key to understanding here is again the distinction between individual undertakings and the whole *carpus* of undertakings, which a party makes. It will be very unusual for a party to have to perform exactly every undertaking he has made but much less uncommon for exact compliance with one requirement to be necessary. Clearly the distinctions between conditions and warranties can be substantial significance here.

2.4.2 Acceptance of partial performance by the promisee:

Although a promisor has only partially fulfilled his obligations under the contract, it may be possible to interfere from the circumstances, a fresh agreement by the parties that payment shall be made for the work already done or for the goods, in fact, supplied. Where this interference would be justifiable the plaintiff sues on a *quantum meruit* to recover remuneration proportionate to the benefit conferred upon the defendant, but an essential of success is an implicit promise of payment by the defendant.

Thus, it has been held that if a ship freighted to Hamburg is prevented by restraints of princes from arriving, and the consignees accept the cargo at another port to which they have directed it to be delivered, they are liable upon an implied contract to pay freight *pro rata itineris*.[20]

2.4.3 Prevention of performance by the promisee:

If a party to an entire contract performs part of the work that he has undertaken and is then prevented by the fault of the

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[20] *Christy v. Row* (1808) 1 Taunt 300; *St. Enoch Shipping Co. Ltd. v. Phosphate Mining Co.,* [1916] 2 KB 624 at 628.

other party from proceeding further, the law does not allow him to be deprived of the fruits of his labour. He is entitled, of course, to recover damages for breach of contract, but alternatively he can recover reasonable remuneration on a *quantum meruit* for what he has done. The leading authority for this obvious rule is *Planche v. Colburn*.[21]

2.4.4 Divisible Covenants:

Another avenue of escape is presented by the distinction between entire and divisible contracts. A contract may be described as divisible in several senses. In contracts of employment, it is usual to provide for payment at weekly or monthly intervals and this has the effect of ousting the principle in *Cutter v. Powell*[22] at least for every completed week or month. Similarly in building contracts, it is usual to provide for payment at intervals, usually against an architect's certificate, and this avoids to a substantial extent the result in *Sumpter v. Hedges*.[23]

In its technical connotation, the term divisible, means, however, rather that situation where one party's performance is made independent of the other's. in this sense, as we have already seen, it is more accurate to talk of divisible covenants rather than divisible contracts, since in relation to any particular contract, there may be some obligations which are dependent and others which are independent of the other party's.[24]

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21 *Planche v. Colburn,* (1831) 8 Bing 14.

22 *Cutter v. Powell,* (1795) 6 Term Rep 310.

23 *Sumpter v. Hedges,* [1898] 1 QB 673.

24 *General Bill Posting Co. ltd. v. Atkinson,* [1909] AC 118; *Taylor v. Webb,* [1937] 2 KB 282 : [1937] 1 All ER 590; *Appleby v. Myers,* (1867) LR 2 CP 651 at 660-661; *Robers v. Havelock,* (1832) 3 B 7 Ad 404; *Menetone v. Athawes,* (1764) 3 Burr 1592; *Hewood v. Wellers* [1976] QB 446 : [1976] 1 All ER 300.

2.5 RIGHT TO CLAIM FOR RECOVERY OF ADVANCE MADE IN THE EVENT OF FAILURE OF PERFECT PERFORMANCE:

Suppose, as discussed in the aforesaid case of *Bolton v. Mahadeva*,[25] the defendant had paid for the work in advance, could he being a innocent party to the breach of contract, recovered his payment? The answer to the question is that he could not, since the test for recovery in such cases is "total failure of consideration". The defendant would have been limited to an action for damages, which would presumably have provided about £200, and therefore, £600 was better off because he must paying on completion rather than in advance. The result is particularly striking in a case such as *Cutter v. Powell,*[26] that the employer would have had no action for damages, since there was no breach of contract.

2.6 RIGHT TO CLAIM TERMINATION OF THE CONTRACT BY THE INNOCENT PARTY:

The concept to claim termination of contract by the innocent party sounds interconnected with the above discussed topics but it is certainly distinct in its own nature. For example, *A* charters a ship from *B* for a voyage charterparty to carry frozen meat from Auckland to Liverpool, it is clear that *A* is under no obligation to load the meat if on arrival at the docks he finds that the ship's refrigeration is not working,[27] but it does not follow that he is entitled to bring the contract to an end. This will depend on whether the law

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25 *Bolton v. Mahadeva,* [1972] 2 All ER 1322 : [1972] 1 WLR 1009.

26 *Cutter v. Powell,* (1795) 6 Term Rep 310.

27 *Stanton v. Richardson,* (1872) LR 7 CP 421.

permits *B* time to repair the refrigerators and whether, it so, he is able to make use of it.

Under the contract of sell of goods, some very strict doctrines have been developed as to the buyer's right to reject goods which do not confirm to the agreed terms of contract. The strictness of the law in this respect is well illustrated by the duty of the seller to make delivery of goods as per the exact standard agreed upon by the parties as a part of terms and conditions of contract. Thus, if the seller delivers more goods than which have been ordered, the buyer may reject the whole consignment and cannot be required to select the correct quantity out of the bulk delivered.[28] In the same manner, if less than the correct quantity is delivered than also buyer may reject the entire consignment of goods agreed upon as per the terms of the contract.

Now let us see in what circumstances does a breach entitle the innocent party to terminate the contract?[29] A breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule established by a long line of authorities is that the right of a party to treat a contract as discharged arises only in two types of case.

(1) Where the party in default has repudiated the contract before performance is due or before it has been fully performed.

(2) Where the party in default has committed what in modern judicial parlance is called a *fundamental*

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28 *Cunliffe v. Harrison,* (1851) 6 Exch 903.

29 Delvin [1966] CLJ 192; Treitel 30 MLR 139.

breach. A breach is of this nature if, having regard to the contract as whole, the promise that has been violated is of major as distinct from minor importance.

2.6.1 Repudiation:

Repudiation in the present sense occurs where party intimates by words or conduct that he does not intent to owner his agreed obligations when they fall due in future as per the terms of contract.[30] In the words of Lord Blackburn:

"Where there is a contract to be performed in the future, if one of the parties has said to the other in effect 'if you go on and perform your side of the contract I will not perform mine', that in effect, amounts to saying 'I will not perform the contract'. In that case the other party may say, 'you have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract."[31]

Repudiation may be either explicit or implicit. An example of the former type is afforded by *Hochster v. De la Tour*,[32] where the defendant agreed in April to employ the plaintiff as his courier during a foreign tour commencing on 1 June. On 11 May he wrote that he had changed his mind and therefore, would not require a courier. The plaintiff sued for damages before 1 June and succeeded.

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30 *Heyman v. Darwins Ltd.,* [1942] AC 356 at 378, 398 : [1942] 1 All ER 337 at 350, 360.

31 *Mersey Steel and Iron Co. v. Naylor Benzon & Co.,* (1884) 9 App Cas 434.

32 *Hochster v. De la Tour, (1853) 2 E & B 678.*

A repudiation is implicit where the reasonable inference from the defendant's conduct is that he no longer intends to perform his die of the contract. Thus, 'if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted'. So also, if *A* conveys a house to *C*, which he had previously agreed to devise to *B*, *A* will be taken to have repudiated the contract.[33] The leading authority on this type of case is *Frost v. Knight*[34] where the defendant, having agreed to marry the plaintiff upon the death of his father, broke off the engagement during the latter's lifetime. The plaintiff immediately sued for damages and was successful. This particular situation can no longer recur, since actions for breach of promise of marriage have now been abolished, but the principles laid down in *Frost v. Knight* are still of general application.

The result, then, of a repudiation, whether explicit or implicit, is that the innocent party acquires an immediate cause of action. But he need not enforce it. He can either stay his hand or wait until the day for performance arrives or treat the contract as discharged and take immediate proceedings.

2.6.2 Fundamental breach:

The next class of case in which the party is entitled to treat himself as discharged from further liability is where his co-contractor, without expressly or impliedly repudiating his

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33 *Synge v. Synge,* [1894] 1 QB 466; *Lovelock v. Franklyn,* (1846) 8 QB 371.

34 *Frost v. Knight,* (1872) LR 7 Exch 111; *Short v. Stone* (1846) 8 QB 358.

obligations, commits a fundamental breach of the contract. Now the question arises, what nature must be a breach be before it is called “fundamental”? To answer this question in a loud and clear manner there are two alternative tests provided. The court may find the decisive element either in the importance that the parties would seem to have attached to the term, which has been broken, or to the seriousness of the consequences that have, in fact, resulted from the breach. Here the researcher would like to suggest that although the tests are often stated and quoted as alternatives, they in fact, both have a part to play. If one applies the first test the governing principle is that everything depends upon the construction of the contract in question. The court has to decide whether, at the time when the contract was made, the parties must be taken to have regarded the promise which ahs been violated as of major or of minor importance. In the words of Bowen LJ:

“There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one’s mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.”[35]

Whether one looks to promise or breach one of the difficulties, has been to formulate with any approach to precision the degree of importance that a promise or breach must possess to warrant the discharge of the contract. A variety of phrases has been used in an endeavour to meet

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[35] *Bentsen v. Taylor, Sons & Co. (No. 2),* [1893] 2 QB 274 at 281.

this need. It has been said, for instance, that no breach will discharge the innocent party from further liability unless it goes to the whole root of the contract, not merely to part of it,[36] or unless it goes so much to the root of the contract that it makes further performance impossible[37] or unless it affects the very substance of the contract.[38] Sachs LJ, 'at the risk of being dubbed old-fashioned', has recently stated his preference for the expression 'goes to the root of the contract', which ahs been the favourite of the judges for at least 150 years.

That leaves the question whether the breach does go to the root as a matter of degree for the court to decide on the facts of the particular case in the same way as it ahs to decide which terms are warranties and which are conditions.[39]

To speak of 'the root of the contract' is, no doubt, to rely on a metaphor; and Lord Sumner once said that 'like most metaphors it is not nearly so clear as it seems'.[40] It does not solve the problem, but rather restates it in picturesque language. Yet a picture is not without value; and the phrase may help judges to crystallize the impression made on their minds by the facts of a particular case. In the Australian case of *Tramways Advertising Pty Ltd. v. Luna Park (NSW) Ltd.,*[41] Jordan CJ said:

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36 *Davidson v. Gwynne,* (1810) 12 East 381 at 389.

37 *Hong Kong Fir Shipping Co. Ltd., v. Kawasaki Kaisen kaisha Ltd.,* [1962] 2 QB 26 at 64, [1962] 1 All ER 474 at 484.

38 *Wallis, Son and Wells v. Pratt and Haynes,* [1910] 2 KB 1003 at 1012.

39 *Decro-Wall International SA v. Practitioners in Marketing Ltd.,* [1971] 2 All ER 216 at 227 : [1971] 1 WLR 361 at 374.

40 *Bank Line Ltd. v. A Capel & Co.,* [1919] AC 435 at 159.

41 *Tramways Advertising Pty Ltd. v. Luna Park (NSW) Ltd.,* (1939) 38 SRNSW 632 at 641; *Associated Newspapers Ltd. v. Bancks,* (1951) 83 CLR 322.

"The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promise that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor."

2.7 EFFECT OF REPUDIATION OR FUNDAMENTAL BREACH:

It is pertinent to note that, even if one of the party wrongfully repudiate all further liability or has been guilty of a fundamental breach the contract will not automatically come to an end. Since, its termination is the converse of its creation principle demands that it should not be recognized unless this is what both parties intend. The familiar test of offer and acceptance serves to determine their common intention. Whether *A* and *B* are parties to an executory contract and *A* indicates that he is no longer able or willing to perform his part of outstanding obligations, he in effect makes an offer to be that the contract shall be discharged. Here in this situation, *B* is presented with an option he may either refuse or accept the offer.[42] More precisely, he may either affirm the contract by treating it still in force, or completely contrary to this, on the other hand, he may treat it as finally and conclusively discharged. The consequences vary accordingly to the choice i.e. preferred by *B* before whom the offer is made to get discharged.

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42 *Denmark Productions ltd. v. Boscobel Productions Ltd.,* [1969] 1 QB 699 at 731 : [1968] 3 All ER 513 at 527.

2.7.1 The innocent party treats the contract as still in force:

If the innocent party chooses the first available option and, with full knowledge of the facts, makes it clear by his words or act or even by his silence, that he refused to accept the breach as a discharge of contract the effect is that the *status quo ante* is preserved intact. The contract "remains in being for the future on both sides, each party has right to sue for the damages for past or future breaches.[43] For example, a seller of goods who refuse to treat a fundamental breach as a discharge of the contract remains liable for delivery of possession to the defaulting buyer, while the latter remains correspondingly liable to accept delivery and to pay the contractual price.[44]

The significance of the rule that the contract continues in existence is well illustrated by the case where a party has repudiated his obligations.

In that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete.[45]

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43 *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.,* [1970] 1 QB 447 at 464-465 : [1970] 1 All ER 225 at 233.

44 *R.V. Ward Ltd. v. Bignall,* [1967] 1 QB 534 : [1967] 2 Al ER 449; *White and Carter (Councils0 Ltd v. McGregor*, [1962] AC 413 : [1961] 3 All ER 1178.

45 *First v. Knight,* (1872 LR 7 Exch 111 at 112; *Johnstone v. Milling,* (1886) 16 QBD 460.

The case of *Avery v. Bowden*[46] illustrates the way in which supervening circumstances may operate to relieve the party in default from all liability.

The defendant chartered the plaintiff's ship at a Russian port and agreed to load her with a cargo within forty-five days. Before this period had elapsed he repeatedly advised the plaintiff to go away as it would be impossible to provide him with a cargo. The plaintiff, however, remained at the port in the hope that the defendant would fulfill his promise, but the refusal to load was maintained, and then, before the forty-five days had elapsed, the Crimean war broke out between England and Russia.

On the assumption that the refusal to load amounted to a complete repudiation of liability by the defendant, the plaintiff might have treated the contract as discharged; but his decision to ignore this repudiation resulted, as events turned out, in the defendant being provided with a good defence to an action for breach. He would have committed an illegal act if he had loaded a cargo at a hostile port after the declaration of war.

2.7.2 The innocent party treats the contract as at an end:

A party who treats the contract as discharged is often said to *rescind* the contract. However, to describe the legal position in such a manner must inevitably mislead and confused unwary. In its primary and more correct sense, rescission means the retrospective cancellation of contract *ab initio*, as for instance, where one of the parties has been

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46 *Avery v. Bowden,* (1855) 5 E & B 714.

guilty of fraudulent misrepresentation. In such a case, the contract is destroyed as if it had never existed, but it discharged by breach never impinges upon rights and obligations that have already matured as per the terms of the contract. It would be better, therefore, in this context, to focus on termination or discharge rather than recession. The said concept has recently been the subject of full authoritative words by the House of Lords in *Johnson v. Agnew.*[47]

By a contract in writing the vendors agreed to sell a house and some grazing land to the purchase price agreed was sufficient to pay off these mortgaged and the purchase price agreed was sufficient to pay of these mortgages and also a bank loan which the vendors had secured to by another property. The purchaser failed to complete on the agreed completion date, and a fortnight later the vendors issued a notice making time of the essence,, and fixing 21 January, 1974 as the final completion date. The purchaser failed to complete on this day and it is clear that the venders were thereupon entitled to bring the contract to an end. They chose instead to sue for specific performance, which was obtained on 27 June 1974. Before the order was entered, however, both the mortgagees of the house and the mortgagees of the grazing land had exercised their rights to possession and had sold the properties. The vendors thereupon applied to the court for leave to proceed by way of an action for damages.

The House of Lords held that by choosing to sue for specific performance the vendors had not made a final election and that it was open to the court to allow the vendors to sue for

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47 *Johson v. Agnew,* [1980] AC 367 : [1979] 1 All ER 883.

damages if it appeared equitable to do so Lord Wilberforce said:

"It is important to dissipate a fertile source of confusion and to make clear that although sometimes the vendor is referred to ... as `rescinding' the contract, this so-called `rescission' is quite different from rescission *ab initio*, such as may arise for example, in cases of mistake, fraud or lack of consent. In those cases the contract is treated in law as never having come into existence ... In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to, or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about `rescission *ab initio'.*[48]

If the innocent party elects to treat the contract as discharged, he must make his decision known to the party in default. Once this decision is conveyed to the party in default, his election is final and cannot be retracted.[49] The effect is to terminate the contract for the future as from the moment when the acceptance is communicated to the party in default. The breach does not operate retrospectively. The previous existence of the contract is still relevant with regard to the past act and defaults of parties. Thus, the party in default is liable in damages both for any earlier

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48 *Buckland v. Farmer and Moody,* [1978] 3 All ER 929 : [1979] 1 WLR 221; *Photo Production Ltd. v. Securicor Transport Ltd.,* [1980] AC 827 : [1980] 1 All Er 556.

49 *Scarf v. Jardine,* (1882) 7 App Cas 345 at 361; *Allen v. Robles,* [1969] 3 All ER 154 : [1969] 1 WLR 1193; *Antaios Cia Naviera SA v Salen Rederiena AB, The Antaios,* [1983] 3 All ER 777 : [1983] 1 WLR 1362; *Vitol SA v. Norelf Ltd., The Santa Clara,* [1994] 4 All ER 109; reversed by the Court of Appeal [1995] 3 All ER 971 and reversed in turn by the House of Lords [1996] 3 All ER 193.

breaches and also for the breach that has led to the discharged of the contract, but he is excused from further performance.[50] However, this does not mean, in the case of an anticipatory breach, that the obligations, which would have matured after the election, are to be completely disregarded. They may still be relevant to the assessment of damages.

The defendant company agreed to pay £40,000 to the plaintiffs in seven weekly installments. *X*, the managing director of the defendants, personally guaranteed the payment, of this debt. At the end of three weeks, the payments were so seriously in arrears as to amount to a repudiation of the contract by the defendants. On 22 December, the plaintiff's accepted this repudiation and then sued the guarantor, X, for the recovery of £40,000, less what had already been paid.

One of the defences raised by the guarantor was that he was not liable in respect of installments falling due after 22 December. The House of Lords rejected this defence.[51]

This decision is in line with the earlier decision of the Court of Appeal in the case of *The Mihalis Angelos.*[52]

By clause 11 of the charterparty, the owners stated that their ship was `expected ready to load at Haiphong under

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50 *Mussen v. Van Diemen's Land Co.,* [1938] Ch 253 at 260 : [1938] 1 All ER 210 at 216; *Boston Deep Sea Fishing and Ice Co. v. Ansell,* (1888) 39 ChD 339 at 365; *R.V. Ward Ltd. v. Bignall,* [1967] 1 QB 534 at 548 : [1967] 2 All ER 449 at 455.

51 *Hyundai Heavy Industries Co. Ltd. v. Papadopoulos,* [1980] 2 All ER 29 : [1980] 1 WLR 1129.

52 *Mihalis Angelos, The See Maredelanto Cia Naviera SA v. Bergbau-Handel GmbH, The Mihalis Angelos,* [1971] 1 QB 164 : [1970] 3 All ER 125.

this charter about July 1st, 1965'. Clause 11 provided that, if the ship was not ready to load on or before 20 July 1965, the charters should have the option of canceling the contract. On 17 July, the charters repudiated the contract and the owners accepted the repudiation. The majority of the Court of Appeal held that the option to cancel the contract was not exercisable before 20 July even though on the 17th it was certain that the ship would not arrive before 20 July. The charters were thus guilty of an `anticipatory breach'.

Here the question that arose was whether the owners could recover substantial damages in respect of the wrongful repudiation on the ground that its acceptance by them had put an end to the contract, together with the right of cancellation. The Court of Appeal was pleased to grant only nominal damages to the owners.

In case of an anticipatory bail, the innocent party is entitled to recover the true value of the contractual rights, which he has lost. If these "were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if, it can be shown that those events were, at the date of acceptance of repudiation, predestined to happen, then the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events", so in that circumstances, as the charterers would certainly have lawfully cancelled on 20 July, the owners have suffered no loss and that is the reason that only nominal damages were granted.

2.8 THE EFFECT OF DISCHARGING THE CONTRACT FOR A BAD REASON, WHEN A GOOD REASON ALSO EXISTS:

The discharge of a contract, based upon a reason that is in fact, inadequate, may nevertheless, "be supported if there are at the time facts in existence be could have provided a good reason". The best example of it is, a seller of goods deliverable by installments makes a short delivery whereupon the buyer claims that the contract is discharged. However, this may be unwarranted, since an intention on the part of the seller to repudiate his obligations is not inferable from the circumstances that led to the short of delivery. It is than discovered that the goods already delivered do not comply with their contractual description, this fundamental breach suffers to justify the discharge of contract.[53]

It would seem that this principle requires some qualification in the light of the decision of the Court of Appeal in *Panchaud Freres SA v. Establissements General Grain Co.*[54]

The plaintiff contracted to sell to the defendant 5,300 metric tons Brazilian yellow maize cif Antwerp, shipment to be June/July 1965. The bill of landing was dated 31 July 1965, but amongst the other shipping documents was a certificate of quality, which stated that the goods were loaded 10 August to 12 August 1965. This would have entitled the defendant to reject the shipping documents but they were

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53 *Cf Denmark Productions Ltd. v. Bosobel Productions Ltd.,* [1969] 1 QB 699 at 722; The Mihalis Angelos, [1971] 1 QB 164 at 195-196; *W. Devis & Sons Ltd. v. Atkins,* [1977] Ac 931 : [1971] 2 All ER 321.

54 *Panchaud Freres SA v. Establissements General Grain Co.,* [1970] 1 Lloyd's Rep 53; *Carvill v. Irish Industrial Bank Ltd.,* [1968] IR 325; *Cyril Leonards & Co. v. Simo Securities Trust Ltd.,* [1971] 3 All ER 1313 : [1972] 1 WLR 80.

received without objection (presumably, though this is not explicitly stated in the report, because the inconsistency was not detected). When the ship arrived the defendant rejected the goods on another ground ultimately held insufficient and only three years later sought to justify rejection on the ground that the goods had been shipped out of time.

The Court of Appeal held that it was too late for the defendant to rely on this ground since in the words of Winn LJ:

"There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct."[55]

2.9 CONTRACTUAL PROVISION FOR TERMINATION:

In the aforesaid discussion, we have already considered the application of basic rules, which apply in the absence of contrary agreement. In practice the parties often do make provisions with substantially alter the impact of these ordinary rules. So in commercial contracts for the sale of goods, it is not unusual, to find non-rejection clauses, under which the buyer is not to reject non-confirming goods, but to look only to his remedy in damages. It is common in many kinds of contract to find provisions which extend one party's right of termination outside the areas of repudiation and fundamental breach. We may divide such provisions into two broad sub groups.

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[55] *The Vladimir Ilich,* [1975] 1 Lloyd's Rep 322; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce*, [1997] 4 All ER 514 : Carter 14 JCL 239.

2.9.1 Termination for "Minor" breach:

The common law rules can operate indulgently to some classes of contract breakers, specially, slow payers. In practice, those who make of habit of paying slowly seldom make repudiatory statements. More commonly their delays are accompanied by protestation of goodwill and a wide range of more or less plausible excuses. Creditors often find it prudent to insert contractual counter measures. This is particularly so in the contracts which call for a series of periodic payments where it is common to have an "acceleration clause", making all the payments due on failure of timely payments of any or of "withdrawal clause", enabling one party to bring the contract to an end if the other party does not pay promptly.

In *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corpn of Liberia, The Iaconia,*[56] the plaintiff ship owners had time chartered a ship to the defendants. The charterparty provided for payment of hire 'in cash semi-monthly in advance' into a named bank account and also provided that failing 'punctual and regular payment of the hire' the owners should be entitled to withdraw the vessel. The seventh and final installment was due on Sunday April 12, 1970, when the banks were, of course, closed. The hire was paid over the counter of the owners' bank for the credit of their account on Monday afternoon. The House of Lords upheld the owners' claim to be entitled to withdraw the vessel for failure of punctual payment. The House did not consider that in a commercial contract using a well-known standard

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56 *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corpn of Liberia, The Iaconia,* [1977] Ac 850 : [1977] 1 All ER 545.

form, there was any need to develop doctrines limiting the strict application of such contractual provisions.[57]

2.9.2 Termination "without clause":

It is not unusual for contracts to contain provisions entitling one party to terminate without the other party having done anything wrong. At first sight of this, it seems strange, but there are many situations where it makes excellent sense. Let us try to understand it through an example. The common law says that if contract is made on Monday and cancelled on Tuesday, before any work has been done, the contractor is entitled to his loss of profit on transaction. This does not correspond with many businessmen's expectation. Contracts often contain provisions permitting cancellation without charge where the contract wholly executory. Even where, work has been done, it is not usual to find provisions for cancellation in written for payment of compensation. The most common examples are in the field of Government contracts, where the need to be able to cancel weapon projects, or motorway schemes makes such provisions easily understandable. The most routine and perhaps the best example is a long-term contract of indefinite duration such as contracts of employment. Here it is common to make express provision for termination by notice and usually easy to infer that the contract is terminable by notice, even in the absence of any express provision. A difficult case of *Staffordshire Area Health*

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[57] *China National Foreign Trade Transportation Corpn v. Eulogia Shipping Co SA of Panama, the Mihalis Xilas,* [1979] 2 All ER 1044 : [1979] 1 WLR 1018; *Awilco, A/s v. Fulvia SpA di Navigazione, The Chikuma,* [1981] 1 All ER 652 : [1981] 1 WLr 314; *Afovos Shipping Co. SA v. Pagnan,* [1983] 1 All ER 449 : [1983] 1 WLr 195; *Italmare Shipping Co. v. Ocean Tanker Co. Inc.* (No. 2), [1982] 3 All ER 273.

Authority v. South Staffordshire Waterworks Co.[58] dealt with the said concept in a very unique context.

In 1908 the predecessors in title of the plaintiffs owned a hospital, which took its water from its own well. Under a private Act of 1909, the defendants were empowered to pump water from a well a mile away, subject to providing the hospital with any water, which it needed, if the supply from the hospital's well was reduced. The rate was to be that which it would have cost the hospital to get the water from their own well and disputes were to be subject to arbitration. By 1918 there was a deficiency**,** which was supplied by the defendants, and in 1927 the hospital decided to abandon their well. In 1929 a contract was then concluded under which `at all times hereafter' the hospital was to receive 5,000 gallons of water a day free and all the additional water it required at the rate of 7d (2.9p) per thousand gallons. By 1975 the normal rate was 45 p per 1,000 gallons and the Water Company claimed to be entitled to terminate the agreement by giving six months' notice.

2.10 THE EFFECT OF MISREPRESENTATION AND DAMAGES:

Would a person be liable for damages if he misrepresents under the Contract Act Section 18? The effect of misrepresentation would entitle a person to damages but if the person is unable to show that there was misrepresentation, he would not be entitled to any damages and the suit based on misrepresentation not proved one to

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58 *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.,* [1978] 3 All ER 769 : [1978] 1 WLR 1387; Tower hamlets London Borough Council v. British Gas Corpn, [1984] CLY 393.

be fraud but at the most all the omission to state the material fact would give following remedy to the plaintiff:

- That the only remedy open to the plaintiff was under Section 19 of the Indian Contract Act, 1872, on the ground of misrepresentation;
- That assuming without deciding that there is a misrepresentation, the plaintiffs had two remedies open to them: (a) avoidance or rescission, and (b) completion and the enforcement of misrepresentation;
- That it was not open to the plaintiff to avoid contract, for which suit was brought after the expiry of the term of contract;
- That even if the plaintiffs were entitled to be put in the same position in which they would have been, if the representation made had been true, the plaintiffs failed to prove that their exceeded Rs. 3,000/- or which the government had already allowed.[59]

The provision of section 73 and 74 can't be read or interpreted in isolation. The concept of damages depends on several circumstances. There circumstances are not alien or new interpretative aspects but those, which will have to be culled out from the agreement. The term agreement is in contraindication to the term contract. The reason being all contract are agreements but it is not vise-versa. For an agreement to be an enforceable contract has to fulfill the definition of the term contract as defined in Section 2(e) of the Indian Contract Act.

There have been numerous cases on unliquidated damages for breach of contract. In *Union of India v. Ms. Commercial*

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[59] *Sorab Shah v. Secretary of State*; 1927 BLR 1535.

Metal Corporation[60] the problem was acute: Whether the plaintiff could claim damages for breach without having bought the goods, and thereby, without having suffered any loss by the breach. In other words, the question was whether the damages under Section 73 were to be awarded on the mere notional assessment, i.e. the difference between the market price and the contract price or on the loss incurred by the buyer on actual purchase.

In this case, the Commercial Metal Corporation agreed to supply to the Union of India leaded bronze ingots in specific quantities at specific rates by a specific date part of the stores were supplied. The market shoot up and the corporation requested for higher price. There was, thus, breach of contract. The matter was referred to the arbitrator who awarded Rs. 2,35,095/- to the Union. The corporation objected to the award, which was filed in Court. Earlier the Union had claimed higher amount before the arbitrator, representing that this was their loss on repurchase. Later, it abandoned this claim and demanded reduced amount based on the corporation demanding higher rates. The corporation, therefore, objected to the award on the ground that there was no proof of repurchase. Also it was stressed that damages should not be awarded unless loss on repurchase was proved.

The Court noted its own earlier decision in *Union of India v. Tribhuwan Das*,[61] wherein it was clearly held that the damages could not be granted unless the plaintiff had purchased the like goods after breach and suffered actual loss. In that case, the Court dissented from the judgments

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60 *Union of India v. Ms. Commercial Metal Corporation,* AIR 1982 Del. 267.

61 *Union of India v. Tribhuwan Das;* AIR 1972 Del. 120.

of the Madhya Bharat[62] and Madras High Courts.[63] That decision rested on the ground that damages have to be granted by way of compensation for the loss sustained and not by way of punishment or punitive action.

The analysis of the law relating to damages propounded by Indian courts is that the law does not penalize the buyer's inaction. Even if the buyer does not go into the market he is entitled to damages all the same if he can show that the market had risen on the date of the breach.

Other arguments, which can be culled out, form this judgment, in support of this view, are as follows:

(i) "The decisive element is the date of breach and the market price prevailing on that date."
(ii) "Illustration (a) to S.73 of the Contract Act... makes the matter quite clear ..."
(iii) Were the law to be otherwise, "people will be tempted not to honour their contracts."
(iv) Law protects the expectation interest. This would enable the plaintiff to be put in the same position in which he would have been had the contract been performed.
(v) The case of *Maula Bux v. Union of India,*[64] decided by the Supreme Court, is not an authority for the proposition canvassed by the corporation. For, in the case, the Union of India had actually purchased the goods from the market.

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62 *Vishwanath v. Amarlal*, AIR 1957 M.B. 190.
63 *Ismail Sait & Sons v. Wilson & Co.*, AIR 1919 Mad. 1053 (D.B.).
64 *Maula Bux v. Union of India;* AIR 1970 SC 1955.

(vi) "That market price on the date following the breach is the yardstick by which the buyer's claim for damage is evaluated and quantified."

(vii) "There are decisional[65] and textual authorities favouring the current established rule.

In *Mysore Sugar Co. Ltd. v. Manohar Metal Industries*,[66] the defendant agreed to buy copper ingots and copper scraps. He lifted part of the quantity and failed to lift the remaining quantity despite the plaintiff's notice to the defendant to resell the goods in case the former did not take away that quantity. The plaintiff sold the goods three months after the date of notice when the market was falling. It was held that the resale price under the circumstances could not afford a valid measure of damages for breach of contract. The plaintiff failed to prove the market rate on the date of breach. The trail Court decreed the plaintiff's suit; but the civil judge on the defendant's appeal "dismissed the suit for damages as no relevant material was placed on record by the plaintiff to fix the quantum of damages." The High Court, on second appeal, agreed with this view and the plaintiff's suit and appeal failed, although the defendant had committed breach of contract. On the question of unreasonable delay, which defeats the measure of damages, the instant Court followed Madras[67] and Lahore[68] precedents. The Court omitted to refer to the cases of *Jamal v. Moola Dawood & Sons Ltd.*,[69] which had laid down

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65 *Troll Markay v. Kameshwar Singh*, AIR 1932 PC 196; *Ismail Sait v. Wilson & Co.*,; *Vishwanath v. Amralal*, AIR 1957 M.B. 190.

66 *Mysore Sugar Co. Ltd. v. Manohar Metal Industries*, AIR 1982 Kant. 283.

67 *Chetty v. T.M. Gajapathi Naidu and Co.*, AIR 1925 Mad. 1258.

68 *Nikku Mal Sardari Mal v. Gur Prasad and Brothers*, AIR 1931 Lah. 714.

69 *Jamal v. Moola Dawood & Sons Co.,* 31 I.C. 949 : I.L.R. 43 Cal. 493.

the date of breach as the test for measurement of damages and *M/s. Murlidhar v. M/s. Harish Chandra*[70] where the plaintiff failed to get any damages because he did not adduce evidence of market rate on the date of breach. The Law on the subject is well settled. The case arose under section 54(2) of the Sale of Goods Act, 1930, which being specific prevailed over section 73 of the Contract Act, which is of general nature.

In *State v. M/s. United Shippers & Dredgers Ltd.*,[71] the Kerala High Court discussed the question of payment of damages under Section 73, 74 and 75. It held that the plaintiff in all these three sections could claim damages only where he had suffered any loss or damage. Etymologically, compensation means recompense for the loss suffered and hence, it held that no damages were due where there was no loss. In the instant case, the arbitrator had said that the state government had not suffered any legal injury (loss or damages). The state, therefore, in the Court's view had no right either to collect any amount in the nature of penalty or damages. The Court spelt out the situation as to payment of damages under Section 74 and copiously quoted part of the judgment of Supreme Court in *Fateh Chand v. Bal Kishan Dass.*[72] It clearly expressed that the words in section 74 "whether or not actual damage or loss is proved to have been caused thereby" refer to a case of payment of reasonable compensation on the basis of material or record where the actual loss or damage "is incapable of proof or not proved."

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70 *M/s. Murlidhar v. M/s. Harish Chandra,* AIR 1962 SC 366.

71 *State vs. M/s. United Shippers & Dredgers Ltd.*, AIR 1981 Ker. 281.

72 *Fateh Chand v. Bal Kishan Dass,* AIR 1963 SC 1405.

This, no doubt, is the correct interpretation of section 74 and carries forward the intention of the legislature. It needs to be stressed, in support, that the emphasis of this section is on the word "proof" and not on the words "caused thereby." Any other interpretation will render the meaning of the words "reasonable compensation" in the section nugatory. Thus, the interpretation of the Court further cements and develops the law on the subject.[73]

2.11 CONTRACT REMEDIES: DAMAGES

The contract once entered and when there is a breach of the said contract, there are specific remedies provided and there is distinct difference between the liquidated damages and penalty. The researcher has made an attempt to discuss all these in detail in the up-coming chapters.[74]

- **Remedies for breach of contract:**

When a breach of contract occurs, the injured or the aggrieved party becomes entitled to the following relieves.

(1) Rescissions of contract;
(2) Suit for remedies;
(3) Suit upon quantum merit;
(4) Suit for specific performance;
(5) Suit for injunction;
(6) Suit for rectification;
(7) Suit for restitution; and
(8) Suit for cancellation of contract.

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73 Annual Survey of the Indian Law, 1982, Vol. 18.

74 *Talchar Coalfields Ltd. v. Central Coalfields Ltd.*, AIR 1978 Cal. 449.; *Birendra Nath Dhar v. Food Corporation of India*, AIR 1978 Cal. 362

➢ **Damages for breach:**

The party who is injured by the breach of a contract may bring an action for damages "Damages" means compensation in terms of money for the loss suffered by the injured party. Every action for damages raises two problems. The first is the problem of "remoteness of damages" and second is that of "Measure of damages."

> Our concern is awarding damages by the breach of the contract, and therefore, the suit for damages both in the Indian law and England law, will have to be based on the principle enunciated by the Court from time to time. Namely Remoteness for breach and the Measure of Damages would have to be culled out from the fact that the damages are compensatory and not penal.[75]

➢ **S. 73 of the Indian Contract Act:**

The same principles are applicable in India. The Privy Council, for example, observed in *Jamal v. Moola Dawood Sons Co.*[76] that section 73 is declaratory of the common law as to damages. The section clearly lays down two rules:

Compensation is recoverable for any loss or damage: -

(a) arising naturally in the usual course of things from the breach, or

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75 *Hadley v. Baxendale,* (1854) 9 Exch. 341*; Horne v. Midland Rly. Co.; Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd*., [1949] 2 K.B. 528, C.A. at 537-538; S. 73 of the Indian Contract Act.

76 *Jamal v. Moola Dawood & Sons Co.,* 31 I.C. 949 : I.L.R. 43 Cal. 493.

(b) which the parties knew at the time of the contract as likely to result from the breach.

The first rule is `objective' while the second rule is `subjective'. The section also provides that the same principles will apply where there has been a breach of Quasi-Contractual obligation.

Thus, the extent of liability in ordinary cases is what may be foreseen by 'the hypothetical reasonable man' one illustration is the decision of the Madras High Court in *Madras Rly Co. v. Govinda Rao.*[77]

The plaintiff, who was a tailor, delivered a sewing machine and some cloth to the defendant Railway Company to be sent to a place where he expected to carry on his business with special profit. Through the fault of the company the goods were delayed in transmission the plaintiff had given no notice to the company of his special purpose.

He claimed as the damages of traveling expenses and loss of profit. The Court held that the damages claimed were too remote.

- **Measure of damages:**

  As far as the Indian law is concerned, it has developed its law of damages merely on the English Law but now the courts have to interpret provisions of Section 73 and 74 of the Indian Contract Act which are discussed and analyzed in *extenso* in the later

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[77] *Madras Rly Co. v. Govinda Rao,* I.L.R. 21 Mad. 172.

chapter. The measure of damages is also being based on either liquidated or unliquidated damages.[78]

(a) Damages are compensatory not penal.
(b) Incidence of Taxation.
(c) Nominal damages in recognition of rights.
(d) Pre-contract expenditure.
(e) Mental pain and suffering.
(f) Duty to mitigate.

Once the extent of recoverable loss is determined, it has to be evaluated in terms of money. This is the problem of measure of damages and is governed by some fundamental principles.

(a) Damages are compensatory not penal:

In the words of ASQUITH J. "It is well settled that the governing purpose of damages is go put the party whose rights have been violated in the same position, so far as money can do so, as if his rights have been observed. The primary aim or principle of the law of damages for a breach of contract is to place the plaintiffs in the same position he would be in if the contract had been fulfilled or to place the plaintiffs in the position. He would have occupied had the breaching contract not occurred.

In *Robinson v. Harman,*[79] the defendant, having agreed to grant a lease of certain property to the plaintiff, refused to do so, the Court allowed the plaintiff by way of damages.

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78 *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd.,* [1915] A.C. 79; *Ford Motor Co. v. Armstrong,* (1915) 31 T.L.R. 267 : 59 S.J. 362, C.A.; *Bridge v. Cambell Discount Co.;* S. 74 of the Indian Contract Act.

79 *Robinson v. Harman,* (1848) 1 Exch. 850.

The expenses incurred by him on the preliminary legal work and also for the profits, which he would have earned, if the lease had been granted to him. Thus, damages are given by way of compensation for the loss suffered by the plaintiff and not for the purpose of punishing the defendant for the breach.

Inconvenience caused by breach may be taken into account. For example, the *Hobbs v. London South Western Rly. Co.,*[80] where a train pulled its passengers to a wrong direction and consequently the plaintiff and his wife, finding no other conveyance, not a place to stay, had to walk home at midnight.

The Jury allowed 8 P. as the damages for inconvenience and 20 P in respect of his wife's illness caused by catching cold. On appeal the Court of Queen's Bench had that the 8P was properly awarded but not 20P.

(b) Incidence of taxation:

Since the principle is that of compensation, and no more than compensation, the benefits received against the loss suffered on account of breach, is not to be reduced by imposing Income tax as earning. This principle was laid down by the House of Lords in *British Transport Corporation v. Gourley*[81] and was followed by the Court of appeal in *Parsons v. B.N.M. Laboratories Ltd.*[82] where HARMAN L. J. stated:

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80 *Hobbs v. London South Western Rly. Co.,* (1875) L.R. 10 QB.

81 *British Transport Corporation v. Gourley,* (1956), HL.

82 *Parsons v. B.N.M. Laboratories Ltd.*, [1964] 1 Q.B. 95 : [1963] 2 W.L.R. 1273 : 107 S.J. 294 : [1963] 2 All ER 658

" .... Where the sum of amount is to be awarded as damages, successful litigant will have to suffer deduction of `tax' in his hands ..."

(c) Pre-contract expenditure:

Pre-contract Expenditure may be recovered as damages if it was within the contemplation of parties. The Court of Appeal laid down this principle in *Anglia Television Ltd. v. Reed.*[83] Here a television artist who having been engaged as a leading actor for a television film repudiated the contract. The producer was unable to find substitute, and therefore, had to abandon the project. The loss of profit was incapable of being estimated. The Court allowed firm as damages the money spent by him in engaging a director, a designer etc. as this kind of expenditure was within the contemplation of the parties. LORD DENNING M.R. explained the principle thus:

The plaintiff in such a case has to elect either loss of profit or expenditure incurred.

(d) Damages for mental pain and suffering:

In ordinary cases damages for mental pain and suffering caused by the breach are not allowed. But they may be allowed in special cases. An illustration is the case of *Western v. Olathe State Bank.* The facts are:-

The defendant a banking corporation, agreed to loan plaintiff money for a trip to California by crediting his account with such sums, as he might need after reaching

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83 *Anglia Television Ltd. v. Reed., [1972] 1 Q.B. 60 : [1971] 3 WLR 528 : 115 S.J. 723.*

his destination. The plaintiff reached California, but the defendant refused to give him the promised credit.

The Court allowed damages for humiliation and mental suffering. The House of Lords in *Addis v. Gramophone Co. Ltd.*[84] listed three situations in which mental pain and suffering can be taken into account.

There are three well-known exceptions to the general rule... namely. Actions against a banker for refusing to pay a customer's cheque when he has fund; Actions for breach of promise of marriage (now abolished in England) and Actions like that in *Flurean v. Thornfill*[85] where the vendor of real estate, fails to make title. But now the principle is revolving round to this that in every proper case damages for mental distress can be recovered. For example, contract for a holiday. Distress caused by the loss of a pet due to a carrier's negligence etc.

- **Section 74 of the Indian Contract Act:**

Section 74 of the Indian Contract Act lays down a slightly different rule. The rule is that where a sum is named in a contract as the amount to be paid in case of breach, regardless whether it is a penalty or not, the party suffering from breach is entitled to receive reasonable compensation not exceeding the amount so named. Thus the named sum constitutes the maximum limit of liability. This has certain advantages over the English system. The section dispenses with the necessity of laying down rules for distinguishing liquidated damages from penalty. Further, according to English Law, the Court must either accept the amount in

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84 *Addis v. Gramophone Co. Ltd.,* [1909] A.C. 488.
85 *Flurean v. Thornhill,* (1776) 2 Wm. Bl. 1078.

whole or reject it in whole. In India, the Court need not reject the amount. It may either accept the amount or reduce it to what appears reasonable.[86]

Yet the distinction between the liquidated damages and penalties are not altogether irrelevant the section. Its relevance in the first place, arises from the fact that the amount contemplated by the parties will be reduced only if it appears to be by way of `penalty' otherwise the whole of it is recoverable as liquidated damages. Secondly, the first explanation to the section uses the word `penalty'. It provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty" where for instance, money is borrowed at 12% interest payable six monthly and the agreement provides that in case of default an interest of 75% shall be payable. This is a stipulation by way of penalty.

2.12 CONCLUSION:

The definition of damages under the Indian Law is now well modified in contraindication to Indian Law which governed and which is in vogue. The rules which governed discharge of contract by breach of various remedies which are available apart from the distinctive injunctions, the law of damages is now well defined. The rule of law and the object of damages will also compensatory in nature. It would be seen that physical loss are subject whereas damages arise out of breach of Contract. However, damage for breach of contract under the English Law is not necessarily eliminated to compensate financial loss alone. Under the Indian Law, damage may also be awarded to compensate for physical

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86 *Fatehchand v. Balkishan Das,* AIR 1963 SC 1405.

damage to the person or the property. Even if there has been no affect of the value of the property, the English Law, as early as, 19th century has held that where there was difficulty in assumption, it would not bar or disentitled person from claiming damages. The English Law has been developed and the General and Special law of damage has developed in India and the English Law has been time and again followed by the Indian courts but Indian courts are not bound to award compensate where no legal injury has resulted and the provisions of law applied to assumption, based on estimated value. The Indian Court has succinctly distinguished when and where the liquidated and unliquidated damages are permitted the comparative position of nature of such claim has been succinctly defined by Apex Court in the case of *Union of India v. Raman Iron Foundry.*[87]

The topics which have been discussed earlier go to indicate that the Indian law is based on the English Law as developed but the Indian law has now been modified and the stipulations for damages and penalty have been eliminated as specifically dealt with by the Indian law under Sections 73 and 74 of the Contract Act whereas under the Common Law a genuine pre-estimate of damage by mutual agreement is recorded as stipulations naming liquidated damage, on which binding the parties. Whereas the Indian legislation has sought to cut across the rules as were prevailing under the Indian Common Law and have enacted the uniform rule, which is applicable to all ingredients which amount to breach of Contract and separate remedies are stipulated.

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87 *Union of India v. Raman Iron Foundry,* (1974) 2 SCC 231.

CHAPTER - III

BASIC DOCTRINE OF FRUSTRATION OF CONTRACT

3.1 INTRODUCTION:

What is frustration of contract? This question can be replied by putting attention and searching reply of two different questions. First is, what is frustration? Second, What is contract? In order to fully comprehend the concept of contract, it may be said that contractual obligation is fully and truly founded on the consent of the parties *consensus ad idem* that is meeting of the minds agreeing to the same thing in the same sense.

It is pertinent to note that such consensus must be followed by free consent of the parties. Parties, while entering into a contract by their free will, share the risk attendant on the transaction, core of the contract, and while doing so, voluntarily and willingly define their reciprocal obligations under the contract. It is up to the parties to incorporate in the contract any saving or restrictive clauses regarding their defined obligations. Such clauses have been termed as exemption clauses.

Under the law, unforeseen or unforeseeable supervening events make the performance of the contract impossible for no fault of the party concerned, contract may be frustrated. Frustration is by operation of law. It results in automatic involuntary extinction of the contract relieving both parties of their liabilities form the point of time of occurrence of that event. But this extinction of contract may not suit the parties who as businessman want the continuity of business

to be maintained and avoid disruption caused by extinction of that contract. To achieve this object, a device has been invented in the shape of *force majeure* clause, intended to keep the contract alive despite the occurrence of frustrating event.

What is the legal force of that clause, its impact on the legal doctrine of frustration of contract, its interpretation, as any other term of the contract or as an exemption (exception) clause, etc., comprise a segment of law calling for special study as this segment seems not to have received the attention it deserves both by the courts and the commentators and in the words of McKendrick[1] "the law on the topic shrieks for attention". An endeavour has been made in this dissertation to respond to this shriek.

3.2 MEANING, DEFINITION AND SCOPE:

3.2.1 Dictionary meaning of word 'Frustration':

As both the statute and the Courts have shied away from defining frustration, we may refer the dictionary meaning of "Frustration". Concise Oxford Dictionary, 1990 edition, states, frustration to mean prevention from achieving a purpose.

As to the basis of the doctrine: "The doctrine of discharge from liability by frustration has been explained in various ways-sometimes by speaking of the disappearance of a foundation which the parties assumed to be at the basis of their contract, sometimes as deduced from a rule arising

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1. Ewan McKendrick, (1995) 2nd Edn., *Force Majeure and Frustration of Contract*, foreword, page (vi).

from impossibility of performance, and sometimes as flowing from the inference of an implied term. Whichever way it is put, the legal consequence is the same" (per Viscount Simon L.C., *Joseph Constantine Steam Line Ltd v. Imperial Smelting Corporation ltd* and in *Heyman v. Darwins Ltd*.[2] "What happens is that the contract is held on its true construction not to apply at all from the time when the frustrating circumstances supervene" (per Lord Wright, in[3] *Denny, Motl & Dickson v. Fraser (James B.) & Co. Ltd*. For an example of the theory that frustration depends on the disappearance of the foundation of the contract rather than on an implied term,[4] *W.J. Tatem Ltd v. Gamboa:*

> "If there is an event or change of circumstances which is so fundamental as to be regarded by the law as striking at the root of the contract as a whole and beyond what was contemplated by the parties and such that to hold the parties to the contract would be to bind them to something to which they would not have agreed had they contemplated that event or those circumstances, the contract is frustrated by that even immediately and irrespective of the volition or the intention or the knowledge of the parties as to that particular even, and even although they have continued for a time to treat the contract as still subsisting". (per Stratified J.)[5]

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2 *Joseph Constantine Steam Line Ltd v. Imperial Smelting Corporation ltd* [1942] A.C. 154, at p. 163. and in *Heyman v. Darwins Ltd* [1942] A.C. 356, at p. 363).

3 *Denny, Motl & Dickson v. Fraser (James B.) & Co. Ltd* [1944] A.C. 265).

4 *W.J. Tatem Ltd v. Gamboa* [1939] 1 K. B. 132

5 *Morgan v. Manser* [1948] 1 K.B. 184, 191

A party to a contract who proves that the performance of a contract has been frustrated is not obliged to prove also that the frustration was not due to his own neglect or default. Whether the defence of "self-induced frustration" (i.e., a reply to an allegation of frustration that the frustration was induced by the party so alleging) applied where the other party is merely negligent and does not deliberately make performance impossible, queer.[6]

The lessee's obligation under a lease cannot be repudiated on the ground that the purpose of the lease has been frustrated.[7]

> "The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such character as that by it the fulfillment of the contract in the way in which fulfillment is contemplated and practicable is so inordinately postponed that its fulfillment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made". (per Bailhache J.)[8]

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6 *Joseph Constantine Stem Line Ltd. v. Imperial Smelting Corporation Ltd* [1942] A.C. 154)

7 *Leightons Investment Trust Ltd. v. Cricklewood Property, Investment Trust Ltd v. Leightons Investment Trust Ltd* [1945] A.C. 221

8 *Admiral Shipping Co. v. Weidner, Hopkins & Co.* (1916)] 1 K.D. 436, approved, [1917] 1 K.B. 242, in the Court of Appeal

"The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract" (per Russel J. in *Re Badische Co.*[9]; referred *Horlock v. Beal* [1916] 1 A.C. 486; *Tamplin Steamship Co. Ltd v. Anglo-Mexican Petroleum*, *etc., Co. Ltd* [1916] 2 A.C. 397; *Phillips v. Britannia, etc. Laundry* [1923] 2 K.B. 832; *Bank Line Ltd v. Arthur Capel & Co.* [1922] 2 K.B. 132, *Herji Mulji v. Cheong Co. Yue Steamship Co.* [1926] A.C. 497; *French Marine v. Compagine Napolitaine D'Eclairage, etc.* [1921] 2 A.C. 494; *Metthey v. Curling* [1922] 2 A.C. 180; *British Moveitonews Ltd v. London & Districts Cinemas Ltd* [1951] 2 All E.R. 617.[10]

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9 *Re Badische Co.* [1921] 2 Ch. 331, at p. 379

10 *Horlock v. Beal* [1916] 1 A.C. 486; *Tamplin Steamship Co. Ltd v. Anglo-Mexican Petroleum*, *etc., Co. Ltd* [1916] 2 A.C. 397; *Phillips v. Britannia, etc. Laundry* [1923] 2 K.B. 832; *Bank Line Ltd v. Arthur Capel & Co.* [1922] 2 K.B. 132, *Herji Mulji v. Cheong Co. Yue Steamship Co.* [1926] A.C. 497; *French Marine v. Compagine Napolitaine D'Eclairage, etc.* [1921]2 A.C. 494; *Metthey v. Curling* [1922] 2 A.C. 180; *British Moveitonews Ltd v. London & Districts Cinemas Ltd* [1951] 2 All E.R. 617

"Where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is prima facie dissolved by the doctrine of frustration. For instance, where a person contracted to let a hall to the plaintiff for use for some concerts, and the hall was accidentally destroyed by fire before the date of the first concert, it was held that the contract was dissolved."[11]

Contract for manufacture of washing machines was not subject to cancellation for "frustration" because of prohibition of manufacture of washing machines.[12]

Cancellation of lease of premises for holding benefit concert by Government was not "frustration" authorizing recovery of rent paid.[13]

Doctrine of "frustration" did not relieve buyer from obligation to perform contract for purchase of Puerto Rican molasses on the ground that war conditions prevented performance because shipping was unavailable.[14]

The law recognizes the doctrine of "frustration", which holds that under the implied condition of the continuance of a contract's subject matter, contract is dissolved when subject matter is no longer available.[15]

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11 Atiyah, 4th ed. (1989), *An Introduction to the Law of Contract*.

12 *Patch v. Solar Corp.*, C.C.A. Wis., 149 F.2d 558, 560.

13 *United Societies Committee v. Madison Square Garden Corp.*, 59 N.Y.S.2d. 475, 476, 186 Misc. 516.

14 *Baetjer v. New England Alcohol Co.,* 66 N.E. 2d 798, 803, 319 Mass, 592.

15 *Greek Catholic Congregation of Borough of Olyphant v. Plummer*, 12 A.2d 435, 439, 338 Pa. 373, 127 A.L.R. 1008.

Where purpose of a contract is completely frustrated and rendered impossible of performance by a supervening event or circumstance, which was not within the contemplation of the parties and could not have been anticipated and guarded against, the contract is discharged under doctrine of "frustration". The doctrine of "frustration" applies where, since formation of contract, there has supervened an event or circumstance of such a character that reasonable men in the position of the parties would not have made the contract, or would not have made it without inserting some appropriate provision, if they had known or anticipated what was going to happen. The essential element in doctrine of "frustration" is impossibility of performance, either absolute, that is, where supervening event or circumstance absolutely prohibits performance of obligation of contract, or relative, that is, impossibility which so changes the nature of obligation of contract as to make it in fact a different obligation. [16]

One relying on defense of "frustration" to excuse nonperformance of contract must not have been instrumental in bringing about intervening event either by positive action or acquiescence, and an act of government alleged to have frustrated performance must be one in its sovereign capacity. Where ship-owner voluntarily subjected ships to control of Maritime Commission under Ship Warrants Act, and thereafter owner cancelled a contract of carriage with importer in accordance with request of Maritime Commission in order to permit carriage of strategic war materials, breach of contract of carriage with importer could not be excused under doctrine of "frustration", not only because order of Commission was foreseeable but also

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[16] *Fifth Ave. v. Taiyo Trading Co.*, 73 N.Y.S.2d 774, 776, 190 Misc. 123.

because act of Commission was not in a sovereign capacity and was merely exercise of contractual right granted by owner.[17]

The principle of "frustration" by supervening act of the sovereign excusing nonperformance of a contract applied only to legislative or executive acts which render performance impossible, and does not apply to a judicial decree in *personam* enjoining performance entered in an action to which promise is not a party.[18]

Although the doctrines of "frustration", and "impossibility" as excuse for non-performance of a contract are akin, frustration is not a form of impossibility of performance and more properly relates to consideration for performance. The doctrine of "frustration" applies where performance of a contract remains possible, but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration. Plaintiff's contract to act for motion picture company was not terminated, under doctrine of "frustration", because interrupted by plaintiff's military service, where the company did not wish to terminate the contract and it did not appear that performance of the contract after completion of military service would impose any undue hardship on plaintiff.[19]

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17 *L. N. Jackson & Co. v. Lorentzen*, D.C.N.Y., 83 F.Supp. 486, 490.

18 *General Aniline & Film Corp. v. Bayer Co.*, 64 N.Y.S.2d 492, 501, 188 Misc.929.

19 *Autry v. Republic Productions, Cal. App.*, 165 P.2d 688, 692.

When “frustration” of a contract in the legal sense occurs, it does not merely provide one party with a defense in an action brought by the other, but it kills the contract and discharges both parties automatically.[20]

The requisitioning by federal government pursuant to Merchant Marine Act of a tug leased by plaintiff to defendant effectuated a “frustration” of the charter agreement and thereby relieved defendant of all obligations there under.[21]

“Frustration” is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract. Where contract is terminated thorough “frustration” of the object thereof, the arbitration clause of contract is likewise thereby suspended as to all matters and disputes, which have not already arisen, unless couched in such terms as will except it out of the results that follow from frustration generally. Where the assumed possibility of a desired object or effect to be attained by either party to contract forms the basis on which both parties enter into it, and such object or effect is, or surely will be, frustrated, under the doctrine of “frustration”, a promisor who is without fault in causing the frustration and who is harmed thereby is discharged from the duty of performing his promise, unless a contrary intention appears. Where from the nature of the contract it is evident that the

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20 *West Street Warehouse v. American President Lines,* 58 N.Y.S.2d. 722, 726, 186 Misc. 238.

21 *Henjes Marine, Inc. v. White Const. Co.*, 58 N.Y.S.2d. 384, 387.

parties contracted on the basis of the continued existence of the person or thing, condition or state or things to which contract relates, under doctrine of "frustration", the subsequent perishing of person or thing, or cessation of existence of the condition will excuse the performance, a condition to such effect being implied, even though promise may have been unqualified. Where it was understood by parties to contract for the sale of copra for shipment to named ports in Colombia that purpose of adventure was the shipment of copra for resale to Colombian buyer and that such shipment could not be made without a permit from Colombian government, under doctrine of "frustration", cancellation or denial of such permit without fault of the buyer terminated the contract, including the arbitration clause thereof. Where, from nature of contract and surrounding circumstances, parties from beginning must have known it could not be fulfilled unless, when time thereof arrived, some particular condition continued to exist, under doctrine of "frustration", in absence of warranty that such condition of things shall exist, contract is to be construed as subject to implied condition that parties shall be excused in case, before breach, performance becomes impossible or purpose frustrated from such condition ceasing to exist without default of either.[22]

Federal orders prohibiting the production and sale of automobiles, radios, refrigerators, and other electrical appliances did not justify tenant in terminating lease of premises to be used in selling such articles, or relieve tenant of obligation to pay rent provided under the lease, on theory of "frustration".[23]

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22 *Johnson v. Atkins*, 127 P.2d 1027, 1028, 1029, 1030, 53 Cal.App.2d. 430

23 *Nickolopulos v. Lehrer*, 40 A.2d. 794, 796, 132 N.J.L. 461.

Where tenant, before commencement of lease but after its execution, was interned as an enemy alien, but there was no showing that tenant's family could not have occupied demised premises, and there was nothing to prevent tenant from using premises other than his detention by federal authorities, there was no "frustration" of venture and tenant's internment did not release him from obligation to pay stipulated rents.[24]

Evidence that at time withdrawing partner left partnership he was classified 1-A under Selective Service Act, and subsequently joined Merchant Marine, did not establish, as a matter of law, a supervening fortuitous event rendering performance of co-partnership agreement impossible to excuse nonperformance under doctrine of "frustration", so as to entitle withd4rawing partner to value of good will of partnership in determining his interest therein.[25]

Where parties contracted for future delivery of corn during war and contract was based on then ceiling price which was subsequently increased at different times and later the ceiling price was abolished and as result the open market price greatly increased, there was no "frustration" of the contract by economic conditions, neither was further performance made impossible so as to relieve the seller from liability for damages for breach of contract.[26]

Frustration is the prevention or hindering of the attainment of a goal, such as contractual performance. The doctrine

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24 *Kollsman v. Detzel*, 55 N.Y.S.2d 491, 492, 184 Misc. 1048.
25 *Meherin v. Meherin*, 209 P.2d 36, 39, 93 Cal.App.2d 459.
26 *Ellis Gray Mill. Co. v. Sheppard*, 222 S.W.2d 742, 747, 359 Mo. 505

that, if the entire performance of a contract becomes fundamentally changed without any fault by either party, the contract is considered terminated.-Also termed *frustration of purpose*.[27]

"Where the entire performance of contract becomes substantially impossible without any fault on either side, the contract is *prima facie* dissolved by the doctrine of frustration. For instance, where a person contracted to let a hall to the plaintiff for use for some concerts, and the hall was accidentally destroyed by fire before the date of the first concert, it was held that the contract was dissolved."[28]

The end of a contract because of the occurrence of something is preventing its fulfillment; for example, war or a major condition makes it suddenly legally prohibited.

Frustration may be defined as the premature determination, owing to the occurrence of an intervening event of change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement. Equally if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstances arising, frustration does not occur. Neither does it arise when one of the parties had deliberately brought about the supervening event by his own choice. But where it does not arise frustration operates to bring the agreement to an end

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27 Black, 7th Edn., 1999, Law of Contract.

28 Atiyah. 4th ed., (1989), *An Introduction to the Law of Contract*.

as regards both parties forthwith and quite apart from volition.[29]

'Frustration' signifies a certain set of circumstances arising after the formation of the contract, the occurrence of which is due to no fault of either party but which renders performance of the contract by one or both the parties physically and commercially impossible.[30]

The doctrine of frustration is the effect that when the performance or further performance of a contract has been rendered impossible or has been indefinitely postponed in consequence of the happening of an event which was not and could not have been, contemplated by the parties to the contract when they made it, a Court will consider what, as fair and reasonable men, the parties would have agreed upon if they had in fact foreseen and provided for the particular event, and if, in its opinion, they would have decided that the contract should be regarded as at an end would discharge the party who would otherwise be liable to pay damages for non-performance. The applicability of the doctrine of frustration of contracts depends upon the particular circumstances of the case in which it is sought to be invoked, where it has not become impossible for a party to discharge his obligation under the contract, but merely burdensome to him to do, the doctrine cannot be invoked. Before the doctrine can be invoked, it must be shown that the cause, which produced frustration, was one, which the

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29 *Kalyani Spinning Mills Ltd. v. Sudha Shashikant Shroff*, AIR 1995 Cal. 48, 61, para 29

30 *C.B.I. Staff Co-op. Bldg. Socy. Ltd. v. D.R. Koteswara Rao,* AIR 2004 AP 18, para 39.

parties to the contract did not foresee and could not, with reasonable diligence, have foreseen.[31]

This doctrine provides, generally, that where existence of a specific thing is, either by terms of contract or in contemplation of parties, necessary for performance of a promise in the contract, duty to perform promise is discharged if thing is no longer in existence at time for performance.[32]

3.2.2 Definition of frustration of contract:

Frustration of contract has not been defined by statute, either in India or UK. It has not been defined judicially, either in India or UK. It is an elliptical expression, which fully stated would be "frustration of the adventure or of the commercial or practical purpose of the contract". "Frustration" is normally used as a short-hand for the technical term (almost qualifying as a term of art), connoting frustration of a contract by a supervening event, which without default of either party, renders the contractual obligation incapable of being performed, because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. In other words, it would mean that without default of either party the very object for which the contract was entered into is defeated by a subsequent uncontemplated turn of events.

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31 (1945) PWN 106 : AIR 1945 Pat 300.

32 *Glidden Co. v. Hellenic Lines Limited, CA'ny 275 F*. 2d 253, 255.

Having failed to catch in the straight jacket of a statutory definition, section 56 of the Indian Contract Act sets out impossibility of performance of contract, that expression is interchangeable with the expression “frustration”.

English Common Law also sets out to explain rather than define frustration of contract, using both phrases, ‘frustration of contract’ and ‘impossibility of performance of contract’ as interchangeable. The judges in both India and UK have explained rather than defined these two expressions.

In UK, for the first time, the word ‘frustrated’ was allowed to appear in statute when Law Reforms (frustrated contracts) Act, 1943 was passed. Even then frustration was not defined, but reference was made to it in section 1 as an interchangeable expression with ‘impossibility of performance’. This action reads as “Where a contract governed by English law has become impossible of performance or been otherwise frustrated and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions shall, subject to the provisions of section 2 of this Act, have effect in relation thereto.

3.2.3 **Scope**:

The scope of frustration is a limited doctrine of frustration. The scope of frustration is basically limited. Doctrine of frustration can only refer to executory contract, where performance is yet to be made, wholly or partially, which becomes impossible of performance due to subsequent and supervening events for no fault of any party. Such events may be conveniently catalogued as (1) destruction of the

subject matter of contract, (2) rendered illegal by supervening law, (3) state of things forming the basis of contract cease to exist, (4) prescribed mode of performance becoming unavailable, (5) if time is of the essence of contract, indefinite or inordinate delay in performance.

3.3 GENESIS OF DOCTRINE OF FRUSTRATION IN ENGLAND:

Historically every contract was an adventure. The times were so uncertain that a business transaction had to face either the perils of the sea or the hazards of the road journey. It was a common occurrence that caravans carrying merchandise were robbed by bandits or ships carrying stores were raided by pirates and buccaneers. It was, therefore, that the journey was started by invocation to God on an auspicious day and thanks giving ceremony performed on safe arrival. Hence, the nomenclature of adventure every contract, therefore, had an inherent element of risk and the concept of contract upto today embodies the allocation or risk between the parties, only the nature of the risk has changed – from transit risk to market fluctuations, government controls, international events relating to war and peace, etc., having their impact on commerce and industry – and performance of executory contract. In every reciprocal promises, there is possibility of a situation arising that a supervening event may be such as to frustrate the contract. It is conceivable that the contract itself may contemplate some of such events and may even take care of them, but in actual practice it is seldom that a contract deals with such events exhaustively and, more often than not, fails to take notice of such events at all. The parties at the time they entered into the contract are commonly concerned with the present rather than uncertain future. It is only when an uncontemplated turn of

events takes place which neither the parties nor the Parliament have envisaged either in the contract or in the law, that the situation demands that the court should determine the impact of such a situation on the contract and come to the conclusion whether the contract is frustrated or not. While the old concept of contract engendered the associate concept of sanctity of contract and consequent absolute liability of the modern concept of standard form contract has led to inroads into both these associate concepts of sanctity of contract and absolute liability. This state of affairs has necessitated the courts to devise the doctrine of "frustration" in order to do justice between the parties in such a situation. How this device has originated and developed is sought to be explained.

Another author E. Allan Farnsworth has this to say on the subject in 2nd Edn., Contracts[33] :

One who is considering whether to make a contract ordinarily makes a number of assumptions in assessing the benefits to be received and the burdens to be shouldered under the proposed exchange of performances? Some assumptions relate to facts that exist at the time the contract is made.

This chapter is concerned with the problems that arise when one of the parties seeks to be excused from performing on the ground that one of that party's assumptions has turned out to be incorrect.

One who seeks to be excused on this ground must contend, at the outset, with the general rule that duties imposed by

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[33] E. Allan Farnsworth, 2nd Edn., pp. 677-701, *Law of Contract*,

contract are absolute. The idea that finality is desirable in consensual transactions, justifiable expectations to be disappointed, is expressed in the maxim, *pacta sunt servanda* i.e. agreements are to be observed.

If a man binds himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement. Unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified liability.

As might be expected, parties faced with this strict rule have devised a variety of ways to quality their contractual obligation. A party that has not qualified its duty in some way such as these, however, must bring itself within a limited number of judicially created doctrines if it would be excused on the ground that one of its basic assumptions has proved to be wrong.

Conventional treatments of the law of contracts have conceptualized the question of excuse under two distinct headings mistake, which deals with assumptions concerning facts that exists at the time the contract is made; and impracticability and frustration, which deal largely with assumptions concerning circumstances that are expected to exist, including events that are expected to occur, after the contract is made. This conceptual division reflects a sense that the allocation of the risk of error in an assumption

should depend on whether the assumption concerns the state of affairs at the time of agreement or at some later time.

The word mistake is generally used in the law of contracts to refer to an erroneous belief – “a belief that is not in accord with the facts”.

Sometimes a contracting party has an erroneous belief about a statute, regulation, or judicial decision, or about the legal consequences of its acts. Some courts have denied relief in such cases on the ground that the mistake is one of “law” other than “fact”, and everyone is supposed to know the law. However, the modern view is that the existing law is part of the state of facts at the time of agreement. Therefore, most courts will grant relief for such a mistake, as they would for any other mistake of fact.

An erroneous belief is not a mistake unless it relates to the facts as they exist at the time the contract is made. A poor prediction of events that are expected to occur or circumstances that are expected to exist after the contract is made is not a mistake.

In some cases, however, this line between a mistake as to an existing fact and a poor prediction as to a future event is less clear. The line between a mistake as to an existing fact and a poor prediction as to the future is especially hard to draw when the parties have extrapolated from existing facts to set their expectations as to the future.

A mutual mistake occurs when both parties are under substantially the same erroneous belief as to the facts. The cases in which an adversely affected party ahs been

allowed to avoid the contract on this ground are not marked by their consistency in either reasoning or result.

The common law has been less receptive to claims of excuse bases on events occurring after the making of the contract than it has been to claims of excuse based on facts that existed at the time of the agreement.

3.4 LEGAL THEORIES OF FRUSTRATION OF CONTRACT IN ENGLAND:

(i) The implied term theory:

This theory suggests that from the very date, on which a contract is constituted, it is implied that a particular state of things would continue to exist till the date of performance, albeit not expressed in the contract. This implied condition discharges the parties if its performance has become impossible. Although the idea underlying the implied term theory germinated in *Taylor v. Caldwell*, the theory emerged as an independent basis for the discharge of the contracts in *F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*,[34] where Lord Loreburn observed:

> "A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to

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[34] *F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* (1916) 2 AC 397 at p.403

> that effect will be implied, though it be not expressed in the contract..."

It is submitted that the theory purports to look into the surrounding circumstances only subjectively. It may be noted that the essence of this theory is that although the parties have not expressed, the court reads into their contract in order to give effect to their real intention at the time of its constitution rather than to modify it. The terms of a contract may comfortably be examined objectively in the light of the surrounding circumstances. Lord Watson posits, "The meaning of the contract must be taken to be not what the parties did intend (for they had neither thought nor intended regarding it), but that which the parties, as fair and sensible men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."[35]

It appears from what has been said above, that the objective approach in the implied theory presupposes the existence of the changed surrounding circumstances'. On the other hand, the subjective approach of this theory makes it rather a generic term because it is difficult to explain fully the intention of the parties at the time of the constitution of the contract.

Although the implied term theory has played a significant role in the development of law on frustration of contracts yet, it has been criticized in many cases. For example, if used in a subjective sense, it becomes difficult to see how the parties can be taken, even impliedly, to have provided

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[35] *Dahi v. Nelson*, *Donkin & Co.*, (1881) 6 AC 38 at p. 59.

for something, which ex hypothesis they neither expected nor foresaw.[36] Lord Wright also criticized the theory on the same count and observed, "It is not possible, to my mind, to say that if they had thought of it, they would have said, well, if that happen, all is over between us……."[37] It may be said, therefore, that if the parties to a contract had foreseen the frustration, even then it is difficult to infer that they would have simply agreed that the contract should come to an end. Discharge of the contract is governed by law rather than the act of the parties. Similarly, when the term is used in subjective sense, it simply boils down to a fiction, because a 'fair and sensible man' has no real existence. As a matter of fact, the opinion of a fair and sensible man is always exercised in the form of a judicial verdict. However, if the implied term theory is accepted, it may be argued that if the frustrating events were foreseen by the parties no frustration can effectively be pleaded; but it is not so. For example, in the Bank Line Case, 1919 AC 435 the observations of the House of Lords clearly indicate that even if the frustrating event has been contemplated by the parties, the court may hold them discharged.

(ii) Disappearance of the foundation theory:

The Judges to whom the 'implied term theory' did not suit were always busy in the line of discovering a new juridical basis of the doctrine of frustration. Ultimately, the courts evolved the 'disappearance of the foundation' theory. This theory starts with a premise that if any subsequent event has washed away the foundation on which the parties rested their contract, a frustration occurs. Besides the

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36 *Davis Contractor Ltd. v. Fareham U.D.C.*, 1956 AC 696.

37 *Denny, Mott & Dickson Ltd. v. Fraser (James, B) & Co. Ltd.* (1944) AC 265.

intention of the parties, there are many factors, which govern the whole creation, performance and dissolution of a contract, which are quite independent of the intention of the parties.[38] This theory has got juridical recognition on sundry occasions. For instance, in *Tatem Ltd. v. Gamboa*,[39] the court held hat if the foundation of the contract goes, either by destruction of the subject-matter or by reason of such long interruption which brings forth a situation under which, if the contract is enforced, it would be a different contract and the parties have not provided what in that situation is to happen, the performance of the contract is to be regarded as frustrated. A remarkable feature of this theory is that the disappearance of the main basis of a contract must be examined in the light of new circumstances, which came into existence following the subsequent event. But, is must be judged very carefully as to which one factor, out of the several, constituting the contract, is to be regarded as its foundation, alleged to have disappeared.

(iii) The just and reasonable theory:

This theory is totally based on the well-known proposition that the task of a court, while disposing of a case, is to reach a just and reasonable solution. Therefore, when a dispute regarding the frustration of a contract comes before a court, it must be guided by all the circumstances, which existed at the time of the constitution of contract and also after the happening of the event. In the new situation, if the court finds that it is not just and reasonable to enforce the contract, it may declare the contract to stand frustrated.

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38 *Russkoe Obsehestvo D' liar Iztstovleria Sharidav Ivoennick Pripassav v. John Stirk & Sons Ltd.,* (1922) 10 LL LR 214.

39 *Tatem Ltd. v. Gamboa*, (1939) 1 KB 132 at p. 139.

Lord Wright[40] may be regarded as the chief protagonist of this theory. However, this theory was vehemently criticized and rejected by the House of Lords in *British Movietonews Ltd. v. London and District Cinemas Ltd.*[41]. Their Lordships were of the opinion that Lord Loreburn was right in holding that no court had an absolving power. In applying this theory, the court gets an authority to vary the terms of a contract in the way it deems fit, whereas alteration of a contract is solely the matter which concerns the parties. While accepting this theoretical premise, it can be argued that those contracts may also be discharged is which the court finds that after happening of the subsequent event it is just and reasonable not to enforce them.

(iv) Change in obligation theory:

This is the most acceptable theory in England. In essence, the theory professes to explain that if an event happens beyond the control of either party and the event brings forth a situation in which performance of the contract would change the obligations undertaken at the time of its formation, the contract frustrates. The theory lays emphasis on the well-settled judicial principle, that while deciding a case on a contract, the primary function of a court of law is to construe it is accordance with its terms and conditions. However, the construction must be made in the light of the changed circumstances. If, on construction it is found that the performance would change the initial obligations of the parties, the frustration comes into effect and the obligations of the parties are dispensed with. In

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40 Lord Wright - *Legal Essays and Addresses*, p. 259.

41 *British Movietonews Ltd. v. London and District Cinemas Ltd.* 1952 AC 166.

Davis Contractors Ltd. v. Fareham U.D.C.,[42] where the building works undertaken by the appellants took more time and money than agreed upon, the House of Lords, declaring no frustration, observed. "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract."

3.5 VIABILITY OF ENGLISH THEORIES IN INDIA:

The second paragraph of S. 56 of the Indian contract Act, 1872, contains rules regulating the subsequent impossibility. The law contained in this paragraph deals with the Indian approach on the doctrine of frustration of contracts and runs as under:

> "A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

Under the abovementioned statutory provision, the doctrine of frustration in India operates in two ways. Firstly, where the performance of a contract becomes impossible by some external faults beyond the control of the promisor and secondly, where the performance of the contract becomes unlawful by reason of any subsequent change in law before its performance. The situations in which either of the two impossibilities may occur are: (i) destruction of the

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[42] *Davis Contractors Ltd. v. Fareham U.D.C.*, 1956 AC 696 at p. 729.

subject-matter, (ii) death of the promisor, (ii) failure of the ultimate object and (iv) change in law. It may be noted that in England too the contracts frustrate on similar grounds but there is a basic difference between the Indian and English law on the approach to the grounds responsible for the frustration of a contract. In England too the contracts frustrate on similar grounds but there is a basic difference between the Indian and English law on the approach to the grounds responsible for the frustration of a contract. In England the courts, justify one of the grounds of frustration on the basis of any of the self-evolved theories whereas, in India there is no room for such a judicial fiat. Indian courts cannot openly justify a frustration on the basis of any other proposition except that which is given in the second paragraph of Sec. 56 of the Indian Contract Act, 1872. But, it is significant to note that whether there is a frustration or not is one issue, and if there is a frustration then how to justify it, remains another issue to be decided. In England, there may be a controversy on thy first issue i.e. whether a contract frustrated at all. The reason is that if a contract is to frustrate in England, it must be backed by any of the prevalent theories. On the other hand, there cannot be any controversy in India regarding the reason behind such a frustration. If the facts of a case come within the ambit of S. 56, there is a frustration whatever be the reason. Therefore, in India, there is no possibility of any controversy regarding the judicial basis of the frustration of a contract. But it is curious to note that although the Indian Courts confine themselves to the letters of second paragraph of S. 56 yet, they purport to justify the decision on grounds similar to any one of the judicial theories of England. In *Satyabarat Ghose v. Mugneeram Bangur &*

Co.,[43] there was contract for the sale of piece of land. Because of the outbreak of Second World War the contract could not be performed as the stipulated land was acquired by the Government for military purposes. After the war, the plaintiff insisted on the performance but the defendant refused to perform the contract on the ground that the contract frustrated. It was held by the Supreme Court of India that under the circumstances there was no frustration of the contract within the meaning of S. 56 of the Indian Contract Act 1872 and the defendant was bound to perform the contract. But, curiously enough, for arriving at this decision, the Court, has taken into account the 'disappearance of the foundation theory'. This is evident from the following remarks of Mukherji, J.:

"This much is clear that the word 'impossible' has not been used in the sense of physical or literal impossibility. The performance of an act may not be literally impossible, but it may be impracticable and useless from the point of view of object and purpose which the parties had in view, and if an untoward event or change or circumstance totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do."

Moreover, in most of the contracts in India, there is no express mention that the contract would frustrate if its performance is prohibited on a later date. But, it may be contended that the court takes it to be an implied term in very contract that where performance of a contract is banned by law, the contract would frustrate. Inadvertently though, it amounts to the application of the 'implied term

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[43] *Satyabarat Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44.

theory'. For example, in recent case, *Union of India v. C. Damani & Co.*,[44] a dealer in export of silver, entered into an agreement with the State Trading Corporation for exporting silver to a foreign buyer and made all arrangements to perform the contract. In the meantime, the export of silver was banned by the Government, including previous contracts. The Supreme Court held that the contract was frustrated and the State Trading Corporation was not allowed to claim indemnity from the export dealer. The court further observed that there is as implied condition in ordinary contracts that the parties shall be exonerated in case, before the breach, the performance becomes impossible on account of any legal prohibition.

In the preceding lines, some examples have been given to ventilate the proposition that despite a well coined statutory provision in respect of frustration, the Indian courts have attempted to justify their decisions on the basis of one theory or the other. But, as a matter of fact, the Indian courts need not take the cognizance of any of the abovementioned theories. The statutory provision in India has taken the essence of all the theories. On a hair-splitting examination of all the theories on frustration in England, we find that the underlying principle in all of them is the impossibility of performance. Section 56 of the Indian Contract Act, incorporates in its provision this essence. But, at the same time, Indian provision does not make this "impossibility' a subjective term. In India the expression is interpreted is its practical sense with the result that frustration is not dependent on surmises as it is in England. Mukherjee, J. rightly observes:

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[44] *Union of India v. C. Damani & Co.*, AIR 1980 SC 1149.

"In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in S. 56 of the Contract Act taking the word 'impossible' in its practical and not literal sense. It must be borne in mind, however, that S. 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties."[45]

3.6 JUDICIAL EXPOSITION OF THE PHRASE 'FRUSTRATION OF CONTRACT' IN ENGLISH LAW:

In the words of Lord Radcliffe in *Davis Contractors Ltd. v. Fareham,* [46] frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foe dera veni*. It was not this that I promised to do .... There must be .... Such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

In the same ruling, as reported at page 721, Lord Reid put the test for frustration in a similar way. "The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation; if it is not, then it is at an end." Later in his speech, he approved the words of Asquith, L.J., that the question is whether the events alleged to frustrate the contract were "fundamental enough to transmute the job the contractor

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45 *Satyabrata Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44

46 *Davis Contractors Ltd. v. Fareham, U.D.C.*(1956) 696.

had undertaken into a job of a different kind which the contract did not contemplate and to which it could not apply." It is submitted that the test put forward by Lord Reid is substantially the same as that of Lord Radcliffe. Lord Somervell agreed with Lord Reid on what is the proper basis of frustration.[47]

3.7 TEXT BOOK EXPOSITION: TRIETEL IN FRUSTRATION AND FORCE MAJEURE, 1994:

Trietel, in *Frustration and Force Majeure* (1994), at pages 57-61 has said:[48]

The expression "frustration" is used in a variety of senses; as Lord Devlin has said, "We are very slovenly about the way in which we used expression like 'frustration'." At least four usages are established: they refer respective to frustration of contract, frustration of the adventure, frustration of purpose and frustration breach.

The expression "frustration of contract" refers to the whole doctrine of discharge by supervening events, irrespective of the type of event, which brings about discharge.

It is, however, submitted that the expression "frustration of adventure" refers to a particular type of event, which may bring about discharge. In this sense, it is both narrower than "frustration of contract", which refers generally to discharge by supervening events, irrespective of their nature; and it is also different in kind: "frustration of contract" refers to the legal effect of the supervening events

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47 Chitty, 26th Edn, *Law of Contracts.*

48 Trietel, (1994), pp.57-61, *Frustration and Force Majeure*.

(i.e., to the discharge of the contract) while “frustration of adventure” refers to one particular causes of discharge.

In cases of frustration of purpose, there is no such prevention at all, but discharge may nevertheless occur because the literal performance of one party’s duty has become useless to the other.

The expression refers to the type of breach, which is sufficiently serious to justify the victim’s rescission of the contract, in the sense that it gives the victim the option of refusing, on account of the breach, to perform his own part of the contract, and to accept further performance from the party in breach.

Obviously cases of “frustration breach” are distinct form the doctrine of discharge by supervening events (the ‘doctrine of frustration)’ since that doctrine cannot be invoked by a party whose ‘default’ brings about, or amounts to, the supervening event which interferes with performance; and for this purpose a ‘frustrating breach’ clearly amounts to default.

Most of the legal systems make provisions for the discharge of a contract, where, subsequent to its formation, a change of circumstances renders the contract legally or physically impossible of performance. In English Law, such a situation is provided for by the doctrine of frustration. Originally, this term was confined to the discharge of maritime contracts by the ‘frustration of the adventure’, but it has not been extended to cover all cases where an agreement has been terminated by supervening events beyond the control of either party. This development is not mere linguistic accident, for it is not strictly necessary that performance

should have become literally impossible, provided that it cannot be properly demanded in the fundamentally different situation which has unexpectedly occurred.

3.8 TREITEL: LAW OF CONTRACT

Under the doctrine of frustration a contract may be discharged if after its formation events occur making its performance impossible or illegal, and in certain analogous situations.

Impossibility Considered:

1. Destruction of a particular thing
2. Death or incapacity
3. Unavailability
4. Failure of a particular source
5. Method of performance impossible
6. Statute
7. Impossibility and impracticability
8. Frustration of purpose [49]

3.9 DEFINITION OF FRUSTRATION IN INDIAN LAW :

(i) Statutory definition:

Turning to Indian Law, we find that though Section 56 of the Indian Contract Act delineates the doctrine of frustration of contract in Para 2, (set out below for ready reference), it does not mention the word frustration. While English statute of 1963 does mentioned “frustration” it does not dare define it.

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[49] Trietel, 7th Edn., p. 663, *Law of Contract.*:

56. "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

(ii) Judicial Definition:

Turning to the Supreme Court decisions, mentioning the word frustration and explaining the doctrine of frustration of contract, reference may be made to *Ganga Saran v. Firm Ram Charan*,[50] where mention is made of doctrine of frustration of contract by observing that "clearly the doctrine of frustration cannot avail a defendant when the non-performance of a contract is attributable to his own default", and also observed that "in these circumstances, this is obviously not a case in which the doctrine of frustration of contract can be invoked. It is further observed that: "It seems necessary for us to emphasize that so far as the Courts in the country are concerned, they must look primarily to the law as embodied in sections 32 and 56 of the Indian Contract Act."

Ganga Saran v. Firm Ram Charan has been followed in *Satyabrata v. Mugneeram*,[51] wherein Supreme Court has observed "The first argument advanced by the learned Attorney General raises a somewhat debatable point regarding the true scope and effect of Section 56 of the Indian Contract Act and to what extent, if any, it incorporates the English rule of frustration of contract. .....The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of

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50 *Ganga Saran v. Firm Ram Charan*, AIR 1952 SC 9.
51 *Satyabrata v. Mugneeram.* AIR 1954 SC 44.

this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. ....We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of section 56 of the Indian Contract Act. It would be incorrect to say that section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be hand to the principles of English law on the subject of frustration. It must be held also, that, to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law 'dehors' these statutory provisions. The decisions of the English courts possess only a persuasive value and may be helpful in showing how the courts in England have decided cases under circumstances similar to those, which have come before our courts. .....The law of frustration in England developed, as is well known, under the guise of reading implied terms and contracts. .....The English law passed through various stages of development since then and the principles enunciated in the various decided authorities cannot be said to be in any away uniform. In many of the pronouncements of the highest courts in England the doctrine of frustration was held 'to be a device by which the rules as to absolute contract are reconciled with a special exception which justice demands'. ....."These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the

Contract Act, taking the word 'impossible' in its practical and not literal sense. It must be borne in mind, however that section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. ....When such an event or change of circumstance occurs which is not fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly was to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object.[52] This may be called a rule of construction, by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule positive law and as such comes within the purview of section 56 of the Indian Contract Act."

Again, *Satyabarat Ghose v. Mugneeram Bangur & Co.*,[53] has been followed in *Mugneeram Bangur & Co. v. Gurbachan Singh*[54] wherein Supreme Court has observed on Page 1525, "Insofar as discharged of contract by reason of frustration is concerned there is no question of implying a term in the contract a term fundamental for its performance, as is done by the Courts in England because we have here the provisions of section 56 as well as those of section 32 of the Contract Act. This is what was held by this Court in

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52 *Vide Morgan v. Manser*, 1947-2 All ER 666 (L).

53 *Satyabarat Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44.

54 *Mugneeram Bangur & Co. v. Gurbachan Singh*, AIR 1965 SC 1523.

the earlier case and that decision binds us. No doubt, a contract can be frustrated either because of supervening impossibility of performance or because performance has become unlawful by reason of circumstances for which neither of the parties was responsible. In the earlier case this Court has held that where the performance of an essential condition of the contract has become impossible due to supervening circumstances the contract would be discharged. This Court has further held that the impossibility need not be an absolute one but is sufficient if further performance becomes impracticable by some cause for which neither of the parties was responsible. It, however, held that the performance of an essential term of the contract, that is to say, of undertaking development of the area under the scheme could not be undertaken because the land had been requisitioned, did not have the effect of frustrating the contract. For though the term regarding development was an essential term of the contract, the requisitioning of the land was only for a temporary period."

Naihati Jute Mill's case[55]

As envisaged by section 56, impossibility of performance would be inferred by the courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had

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[55] *Naihati Jute Mill's* case, AIR 1968 SC 522.

disappeared either by the destruction of the subject matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of either party the contractual obligation had become incapable of being performed because circumstances in which performance was called for was radically different from that undertaken by the contract. But the common law rule of contract is that a man is bound to perform the obligations, which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible.

These theories have been evolved in the main to adopt a realistic approach to the problem of performance of contract when it is found that owing to cause unforeseen and beyond the control of the parties intervening between the date of the contract and the date of its performance it would be unreasonable and unjust to exact its performance in the changed circumstances.

The necessity of evolving one or the other theory was due to the common law rule that courts have no power to absolve a party to the contract from his obligation. On the one hand, they were anxious to preserve intact that sanctity of contract while on the other the courts could not shut their eyes to the harshness of the situation in cases where performance became impossible by causes which would not have been foreseen and which were beyond the control of parties.

Such a difficulty has, however, not to be faced by the courts in this country. In *Ganga Saran v. Ram Charan*,[56] this court emphasized that so far as the courts in this country are concerned they must look primarily to the law as embodied in sections 32 and 56 of the Contract Act. In *Satyabrata Ghose v. Mugneeram*,[57] also, Mukherjee, J., stated that "section 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties. Since under the Contract Act a promise may be express or implied in cases where the court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56. Although in English law such cases would be treated as cases of frustration, in India they would be dealt with under section 32."

***Dhruv Dev v. Harmohinder Singh*[58]**

It has been held by this court that the rule in section 56 exhaustively deals with the doctrine of frustration of contracts and it cannot be extended by analogies borrowed from the English common law. In *Satyabrata Ghose v. Mugneeram Bangure & Co.*,[59] Mukherjea, J., observed that "The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and

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56 *Ganga Saran v. Ram Charan*, AIR 1952 SC 9.
57 *Satyabrata Ghose v. Mugneeram*, AIR 1954 SC 44.
58 *Dhruv Dev v. Harmohinder Singh,* AIR 1968 SC 1024.
59 *Satyabrata Ghose v. Mugneeram Bangure & Co.*, AIR 1954 SC 44

hence comes within the preview of section 56 of the Indian Contract Act.

No useful purpose will be served by referring to the judgments of the Supreme Court of the United States of America and the Court of Session in Scotland to which our attention was invited. Section 56 of the Contract Act lays down a positive rule relating to frustration of contracts and the Courts cannot travel outside the terms of that section.

By its express terms section 56 of the Contract Act does not apply to cases in which there is a completed transfer.

Bhootalinga Agencies v. V.T.C. Poriaswami[60]

In English law, therefore, the question of frustration of contract has been treated by courts as a question of construction depending upon the true intention of the parties. In contrast, the statutory provisions contained in section 56 of the Indian Contract Act lay down a positive rule of law and English authorities cannot therefore be of direct assistance, though they have persuasive value in showing how English courts have approached and decided cases under similar circumstances.

Sushila Devi v. Hari Singh[61]

The impossibility contemplated by section 56 of the Contract Act is not confined to something, which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be

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60 *Bhootalinga Agencies v. V.T.C. Poriaswami*, AIR 1969 SC 110.

61 *Sushila Devi v. Hari Singh,* AIR 1971 SC 1756.

held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract.

Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai[62]

This ruling follows *Mugneeram Bangur & Co. v. Gurbachan Singh*,[63] and *Sushila Devi v. Hari Singh.*[64] It has been observed that "The parties are, therefore, governed purely by section 56 of the Contract Act according to which a contract becomes void only if something supervened after its execution which renders it impracticable. On the contention advanced on behalf of the respondents, the question that arises is whether the above quoted order of the Prant Officer, Thana Prant, dated December 8, 1958, rendered the contract impracticable. The answer to this question is obviously in the negative. The said order, it will be noted, was not of such a catastrophic character as can be said to have struck at the very root of the whole object and purpose for which the parties had entered into the bargain in question or to have rendered the contract impracticable or impossible or performance. ....We are, therefore, clearly of the opinion that no untoward event or change of circumstances supervened to make the agreement factually or legally impossible of performance so as to attract section 56 of the Contract Act."

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62 *Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai*, AIR 1977 SC 1019.

63 *Mugneeram Bangur & Co. v. Gurbachan Singh*, AIR 1954 SC 44

64 *Sushila Devi v. Hari Singh,* AIR 1971 SC 1756.

3.9.1 Concept of supervening illegality has been taken into consideration:

Where, however, a contract is affected by supervening illegality, the court has to take into account, not only the relative interests of the parties, but also the interests of the public in seeing that the law is observed; and this public interest may sometimes outweigh the importance of achieving a fair distribution of loss. For this reason supervening illegality is a separate ground of discharge from supervening impossibility, and is to some extent governed by special rules.

"After the parties have made their agreement, unforeseen contingencies may occur which prevent the attainment of the purpose that they had in mind. The question is whether this discharges them from further liability."[65]

It is not possible to tabulate or to classify the circumstances to which the doctrine of frustration applies. Upon proof that the continuing availability of a physical thing or a given person is essential to the attainment of the fundamental object, which the parties had in view, the contract is discharged if, owing to some extraneous cause such thing or person is no longer available.

Another cause of frustration is the non-occurrence of some event, which must reasonably be regarded as the basis of the contract. This is well illustrated by the coronation cases. The doctrine is certainly applicable if the object, which is the foundation of the contract, becomes unobtainable. A common cause of frustration, especially in

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65 Cheshire, Fifoot & Furmston, 11th Edn, pp. 554-560, *Law of Contract.*

time of war, is interference by the government in the activities of one or both of the parties.

Whether the outbreak of war or an interference by the government discharge a contract depends upon the actual circumstances of each case. The principle itself is constant, but the difficulty of its application remains. Discharge must be decreed only if the result of what has happened is that, if the contract were to be resumed after the return of peace or the removal of interference, the parties would find themselves dealing with each other under conditions completely different from those that obtained when they made their agreement. The contract must be regarded as a whole and the question answered whether its purpose as gathered from its term has been defeated.

3.9.2 Frustration is a rule of construction of contract:

Law relating to frustration of contract makes a fascinating study. Though technically a principle of positive law captured in the straight jacket of section 56 of the Indian Contract Act, it is in actual practice a rule of the construction of the contract. There are still many dark areas relating to this branch of law, which await discovery and enlightenment. Our system of law is based on Anglo-Saxon jurisprudence. The law of frustration as codified in the Indian Contract Act, section 56, in 1872, reflected the English Common Law obtaining at that time modified as considered suitable for conditions in India. While the English Common Law has moved with the times, the Indian Law has remained static.

3.9.3 Law of frustration tied up with law relating to breach:

Law of frustration is tied up with the law relating to breach. The question of frustration comes up only in the event of non-performance of the contract. Non-performance would amount to breach if there is no lawful justifiable excuse for such non-performance. Many a time the defaulting party while ferreting out for an excuse advances the plea of supervening event as frustrating the contract. If frustration can successfully be pleaded, the result is automatic dissolution of the contract and consequently rendering the question of breach irrelevant.

3.9.4 Concept of frustration tied up with development of concept of contract:

The concept of frustration of a contract is inextricably tied up with the development of concept of contract through the ages with particular reference to the doctrine of absolute liability under the contract. The development of law of contract runs parallel to the development of political thought and economic advancement. During eighteenth and nineteenth centuries, the philosophy of laissez faire and theory of natural law became popular. "The judges of the eighteenth century interpreted the theory of natural law to mean that men had an inalienable right to make their own contract for themselves. The judges of the nineteenth century, influenced by the philosophy of laissez faire, held the view that law should interfere with citizens as little as possible leaving it to them to enter into any contract which they liked, unhampered by any interference either by the State or by the judiciary"[66]. "It is that men of full age and

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[66]. Anson, 23rd Edn., p.23, *Law of Cotnract*, (quoted with approval by Supreme Court in AIR 1968 SC 599 at 604).

competent understanding, shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by Courts of Justice."[67]

3.9.5 Gradual changes in the Doctrine of Absolute Liability of the Contract in English Law:

At one time the doctrine of absolute liability of the contract held complete sway and if the contract did not contain any clause providing for a contingency as absolving a party from performance, which was due to circumstances beyond control, the party was held liable absolutely to perform the contract. Slowly but steadily this doctrine has been undergoing changes in the English Law of Frustration illustrated by judicial decisions and legislation (which may be characterized as landmarks) set out below in chronological order:

1. *Paradine v. Jane,* (1647) Aleyn 26.
2. *Taylor v. Caldwell,* (1863) 3 B & S 826.
3. *Baily v. De Crespigny*, (1869) LR 4 QB 180.
4. *Jackson v. Union Marine Insurance Co. Ltd,* (1874) LR 10 CP 123.
5. *Dahl v. Nelson, Donkin and Co.,* (1881) 6 AC 38.
6. *Henre Bay Steam Boat Co. v. Hutton,* (1903) 2 KB 683;
7. *Krell v. Henry*, (1903) 2 KB 740.
8. *Tamplin SS Co. v. Anglo-Mexican & Co.,* (1916) 2 AC 397.
9. *Bankline Ltd. v. Arthur Capel & Co.,* (1919) AC 434.
10. *Russokoe & Co. v. John Stirk and Sons Ltd.,* (1922) 10 LR 214.

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67. Chesire, Fifoot & Furmston, 11th Edn., p.12, *Law of Contract.*

11. *Larrinaga v. Societe Franco-Americaine,* (1923) 39 TLR 316 : 92 LJ KB 455.
12. *Hirji Mulji v. Cheong Yue SS Co. Ltd.,* (1926) AC 497.
13. *Maritime National Fish Ltd. v. Ocean Traders Ltd.,* (1935) AC 524 –13.
14. *Joseph Constantine SS Line Ltd. v. Imperial Smelting Corporation.,* (1942) AC 154.
15. Law Reform (*Frustrated Contracts*) Act, 1943.
16. *Denny Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd.,* (1944) AC 265.
17. *Sir Lindsay Parkinson Ltd. v. Commissioner of Works*. (1949) 2 KB 632.
18. *British Movietonews Ltd. v. London & District Cinemas Ltd.,* (1951) 1 KB 190.
19. *Davis Contractors Ltd. v. Fareham*, (1956) AC 696.
20. *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.,* (1962) 2 QB 26.
21. *Tsakiroglou & Co. v. Noblee Thorl GMBH.,* (1962) AC 93.
22. *Ocean Tramp Tankers Corporation v. V/O Sovfracht (The Eugenia),* (1964) 2 QB 226.
23. *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co. Ltd.,* (1978 2 All ER 769: (1978) 1 WLR 1387.
24. *National Carriers Ltd. v. Panalpina (Northern) Ltd.,* (1981) 1 All ER 161.
25. *The Nema*, (1981) 2 All ER 1030.
26. *BP Exploration v. Hunt),* (1982) 1 All ER 925.
27. *Kodros Shipping Corpn. v. Empresa Cubana de Fletes, (The Evia.),* (1982) 3 All ER 350.

Paradine v. Jane (1647)[68]

In the classic case of *Paradine v. Jane* in (1647) the facts of the case were that Paradine sued Jane for rent due upon a lease. Jane pleaded 'that a certain German Prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and had him expelled, and held out of possession. ...Whereby he could not take the profits'. This plea was in substance a plea that the rent was not due because the lessee had been deprived, by events beyond his control, of the profits from which the rent should have come. The Court held that this was no excuse: "but where the law creates a duty or charge and the party is disabled to perform it and hath no remedy over, there the law will excuse him.... When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." The decision, though correct in itself according to the law obtaining at that time, could not have sounded or seemed to be reasonable, as a citizen had been prevented by an alien enemy from having use of the land leased out to him and earn profits and yet made liable to pay rent for the use of the land. The state, while failing to protect its citizen against the onslaught of an alien enemy, was there to enforce a contract regarding

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[68]. *Paradine v. Jane,* (1647) Aleyn 26.

payment of rent, which liability can only arise if the citizen were permitted to reap the profits of the use of the land. This inherent absurdity did send shock waves, which produced results, though it took couple of centuries to do so.

Taylor v. Caldwell (1863)[69]

The thinking at that time was that the contract is a result of *laissez-faire*, free will of the parties competent to contract and intelligent enough to understand the import of their obligations. Yet curiously, though the contract was labeled as a piece of private legislation, yet a distinction was drawn between a duty created by law and a duty created by contract. While there was relied in the case of the former, no relief as in the case of the latter. Even in the absurd circumstances of an alien enemy depriving the lessee of the use of his land, he was held liable to pay the rent stipulated because he had not provided for such a contingency giving him relief in the contract. However, in 1863 in *Taylor v. Caldwell*, the reality of the situation was recognized by the court. In this case, the defendants had agreed to permit the plaintiffs to use a music hall and gardens for concerts on four specified nights. After the contract was made, but before the first night arrived, the hall was destroyed by fire. Blackburn, J., giving the judgment of the Court of Queen's Bench, held that the defendants were not liable in damages, since the doctrine of the sanctity of contracts applied only to a promise which was positive and absolute, and not subject o any condition express or implied. The learned judge employed the concept of an implied condition to introduce a doctrine of frustration into English law, since he

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69 *Taylor v. Caldwell, 32 LJ QB 164.*

said that it might appear from the nature of the contract that the parties must have known from the beginning that the fulfillment of the contract depended on the continuing existence of a particular person or thing. He held that the particular contract in question was to be construed "as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor. .....The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. "The principle of *Taylor v. Caldwell* was soon applied in other cases and accepted by the legislature in relation to agreements for the sale of goods. Though the doctrine of frustration was first introduced into English law to cover situation where the physical subject matter of the contract had perused (as in *Taylor v. Caldwell*), it was quickly extended to cases where, without any such physical destruction, the commercial adventure by the parties was frustrated.

These two cases, (1) *Paradin v. Jane*, (2) *Taylor v. Caldwell* are leading lights on the horizon of contractual liability. The first regarding legal fiction of absolute liability, the other regarding reality of supervening circumstances rendering performance impossible.

The pre-eminence of justice over law cannot be over emphasized. While justice in conformity with law is ideal, in case it is not possible and there is conflict between justice and law, it is justice, which will prevail. The pre-eminence of justice has been recognized and pride of place accorded to justice by our lawgivers by embodying in Article 142 of the Constitution, supremacy of justice.

Justice expects the promisor to perform what is humanly possible and no more. Ultimately, it is justice that triumphs and doctrine of frustration is born and continues to flourish – developing from impossibility to impracticability – to failure of object of contract – purpose of contract. But, time comes when the jurists ponder over the rigors of the doctrine of frustration having the effect of automatic dissolution of the contract from the time of occurrence of the frustrating event – and then to mitigate such rigors the doctrine of *Force Majeure* is born – by which the parties can incorporate in the contract itself that any specified frustrating event(s) will not frustrate the contract, but keep it alive irrespective of occurrence of that event or in the alternative, keep it in suspended animation, to be reactivated when the temporary setback – the effect of that event passes off. But to draw up a complete and comprehensive *Force Majeure* Clause, calls for not only a good draftsman but an expert astrologer who can foresee the future and may be in the words of American writer, Corbin ‘wisdom of Solomon”.

Having epitomized the development of doctrine of frustration, we may now proceed to have a detailed discussion of the two cases (1) *Paradine v. Jane* (2) *Taylor v. Caldwell*, their impact and analysis.

These two cases indicate conflict between two principles; (i) sanctity of contract, (ii) basis of contract being shared but unexpressed assumptions. Both principles are covered by Latin expression (i) *pacta sunt servanda*, (ii) *rebus sic stantibus*. As regards (i), this principle insists on the literal performance of contracts in spite of the fact that events occurring after the contract was made have interfered with the performance of one party, or reduced its value to the other; it is based on the view that one of the principal purposes of contract as a legal and commercial institution is precisely to allocate the risks of such events. It takes the position that those risks, having been so allocated by the parties, should, as a general rule, not be re-allocated in a different manner by the courts. As regards (ii), its effect is in certain cases to discharge contractual obligations because circumstances have changed since the conclusion of the contract so as to destroy a basic assumption which the parties had made when they entered into the contract. It may be noticed that frustration is concerned with subsequent supervening events and not antecedent events. The effect of antecedent events, i.e., those which had already taken place at the time of contracting, is governed by principles which may in some respects be related to those which apply to supervening events, but it is submitted that the two sets of principles are nevertheless distinct. The distinction, in English terminology, can be summed up by saying that antecedent events may make the contract void for mistake while supervening events may discharge it by frustration. Nevertheless the analogy between initial invalidity on the ground of mistake and discharge under the doctrine of frustration is imperfect for a number of reasons. One can point, in particular, to three distinctions between the two doctrines, and also make a point about their

historical development. The first distinction relates to the state of mind of the parties. The type of mistake with which frustration is said to be analogous is mistake, which nullifies consent (also described as “common” mistake) i.e., a fundamental mistake of both parties as to the subject matter of the contract. Inherent in the notion of “mistake” is the idea that the parties entertain an affirmative belief in the existence of a state of affairs when in fact that state of affairs does not exist, e.g., in the existence of the subject matter, when in fact it has been destroyed. If the parties entertain no such belief, their state of mind cannot be described as mistake; the law relating to the effect of mistake on contracts distinguishes between indifference and mistake. In cases of mistake, it is also a requirement for relief that the mistake must induce the contract. Second distinction relates to the legal effects of the two doctrines. Mistake makes a contract void *ab-initio*, while frustration only discharges it with effect from the occurrence of the frustrating event. The third point is of a more practical nature. It is said to be a requirement of invalidity on the ground of mistake that the mistake must be “fundamental” and the same expression is used to make the point that it is only a “fundamental” change of circumstances, which brings the doctrine of discharge into play. The differences so far listed appear to support the judicially expressed view that mistake and frustration are “different juristic concepts” in that they are brought into operation by circumstances which differ significantly from each other (and differ not only in respect of the time at which the obstacle to performance arises), and in that they give rise to different legal effects. The same view is also supported by one curious aspect of the history of the matter. The origin of the doctrine of discharge by supervening events is generally traced back to the judgment of Blackburn, J., in Taylor v. Caldwell in 1863.

only four years later, Blackburn, J., delivered the judgment of the court in the leading case of *Kennedy v. Panama Royal Mail Co.* but that judgment contains no reference to *Taylor v. Caldwell*, even though that case was cited by counsel in the Kennedy case.

Paradine v. Jane is generally regarded as the authority for the doctrine of absolute contracts. Taylor and Caldwell, is generally considered to have established the doctrine of discharge by supervening events, the doctrine of frustration. In the case of *Paradine v. Jane* the court drew a distinction between two situations and laid down two propositions of law pertaining to them, as follows: (1) Where the law creates a duty and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. .....(2) “But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Question arises what is meant by “if he may”? Do they mean “if he physically can” or “if he is permitted by law to do”? It seems that they cannot have the former meaning, because the party is liable in spite of the fact that what he promised became impossible. The distinction between cases “where the party by his own contract creates a duty” and those “where the law created a duty” is not the same as the modern distinction between contractual duties and duties arising out of breach of contract. The distinction may be said to resemble the modern distinction between express terms and implied terms. The implied terms in question are those, which the law implies in the absence of agreement to the contrary – to verbalise legal incidents of such contractual relationships. Such terms are called “terms implied in law”.

The point of the distinction between the two situations described in *Paradine v. Jane* is that “accident by inevitable necessity” is no defence to an action to an express contractual promise; but the judgment seems to recognize that such circumstances can be a defence to an action for breach of an implied term. This is made plain by the contrast between the two examples given: a tenant is not liable for waste “if a house is destroyed by tempest” but is liable for breach of an express covenant to repair a house “though it be burnt by lightening”.

A qualification of the doctrine of absolute contractual liability was spelt out by Blackburn, J., in Taylor v. Caldwell. The example that he gives is that of a sale of “specific chattels” to be delivered on a future day, which perish without the fault of the seller after the property in them has passed to the buyer but before the day fixed for delivery. It followed that the purchaser must pay the price and the vendor is excused from performing his contract to deliver, which has thus become impossible.

Taylor v. Caldwell is a turning point as the law moved away from the doctrine of absolute contracts to the doctrine of discharge by supervening events. The change was brought about by deducing a general principle from a series of particular situations. Balckburn, J., relied on three such situations – cases in which death or permanent incapacity prevent performance of a contract for personal services, cases in which specific goods are sold and perish after the property in them has passed to the buyer, and cases in which the subject-matter of a bailment was destroyed without any default on the part of the bailee. From these, he deduces the general principle “from the nature of the contract, it appears that the parties must.. have known that

it could not be fulfilled unless ..... some particular specified thing continued to exist". The effect of the principle will be that "the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor". The result will be "both parties are excused".

The "performance" which was excused was only that which had become impossible. This was the only point, which actually arose for decision in *Taylor v. Caldwell*. But the court held 'both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things'.

Referring to this conclusion, the modern doctrine of discharge, which has its roots in *Taylor v. Caldwell* is generally thought to provide a better solution to the problem of the effects of supervening events on contracts than that which had been provided by the doctrine of absolute contract. In explaining this view, it will be convenient to make use of a set of terminological distinctions, which are familiar to civil lawyers, though they have not in the past been commonly found in English discussions of the topic. We shall refer to the person who has undertaken the performance, which has become impossible as the debtor of that performance and the other party as the creditor of that performance (their roles as debtor and creditor are, of course, reversed in relation to the counter-performance for the now impossible performance). The effect of the doctrine of discharge is that the debtor is excused from his duty to render the (now impossible) performance, while the creditor is excused from rendering the counter-performance, i.e., (usually) from having to pay a sum of money for the

performance, which had been promised by the debtor. In the most common contractual situation, in which some performance other than a payment of money is to be exchanged for such a payment, it can be said that the "performance risk" or the former performance is on the creditor of that performance (i.e., he will neither receive performance nor be entitled to damages for non-performance) while the "payment risk", or "counter-performance risk" is on the debtor (i.e., he will not be entitled to claim the promised counter-performance, which is usually the money promised by the creditor for the debtor's performance which has become impossible). The statement in *Taylor v. Caldwell* that "both parties are excused" has the effect that each party bears one of these two risks.

It will be noted that in *Paradine v. Jane* the performance risk and the payment risk are united in one party (both being borne by the tenant) while in *Taylor v. Caldwell* they are divided, thus splitting the loss.

The doctrine of discharge formulated in *Taylor v. Caldwell* was extended to cases in which performance had become impossible, otherwise than by reason of the perishing of a specific thing, e.g., to cases where a thing necessary for the performance of the contract was permanently or temporarily requisitioned, or in some other way became temporarily unavailable for the purpose of performance, or where the impossibility affected only the method of performance, or where the subject-matter was not a specific thing, but was one to be taken from a specific source which failed. Further, the doctrine was extended to cases in which the supervening event had not made performance by

either party impossible at all but had frustrated the purpose of the contract.

The expression "purpose of contract" sets us thinking whether a bilateral contract has common purpose or each party to the contract has its own purpose. To be able to answer this question, we may refer to Corbin on Contracts Art. 1322, saying, "each of the two parties to a contract has an object or purpose for which he joins the transaction. These purposes are not identical ……. There is 'no purpose of the contract', instead there are the purposes of the parties to the contract." However, he ends by referring to "further an ultimate purpose", which can be said to be common purpose of the contract.

Further, in Australia, Latham, C.J. has said, "There is some difficulty in specifying the 'common object' of the parties to a contract ……contracting parties are not partners. They are engaged in a common venture only in a popular sense."[70]

This concept can well be illustrated by a contract of sale of goods. One party's purpose is to supply, the other party's purpose is to receive. One sells, the other buys the goods, the subject matter of contract. But the common purpose is availability of the goods sold. If the availability is affected by supervening circumstances, beyond the control of the parties, making it impossible (impracticable) to perform, the purpose of the contract is frustrated.

This concept is also illustrated by "coronation cases" – considered under the heading of the leading case; *Krell v.*

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70 *Scanlan's New Neon Ltd. v. Tooheys Ltd.*, (1943) 67 CLR 169, 197.

Henry where though the room let out was physically available but the purpose of the contract viewing the coronation procession was frustrated.

Baily v. De Crespigny (1869)[71]

Though there was no physical destruction of the subject-matter, yet the doctrine of frustration was applied in 1869 in *Baily v. De Crespigny*, as in that case the contractual obligation of the lessor became impossible of performance consequent on subsequent statute, under which a railway company compulsorily acquired the land and erected a station on it, in respect of which land there was a covenant included in the contract that the lessor or his assigns would not build on that land which was adjoining the demised premises. It was held that the railway company compulsorily acquiring land would not be included in the connotation of the word assignee as the lessor had not chosen the railway company by his volition but he was compelled by statute to part with the land to the railway company whom he cannot bind by any stipulation.

Jackson v. Union Marine Insurance Co. Ltd. (1874)[72]

This development of the doctrine of frustration is further illustrate in 1874 in *Jackson v. Union Marine Insurance Co. Ltd.,* which propounded the theory of frustration of common ventures. The facts of the case were: “A ship was chartered in November, 1871 to proceed with all possible dispatch, danger and accidents of navigation excepted, from Liverpool to Newport and there to load a cargo of iron rails

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71 *Baily v. De Crespigny,* LR 4 QB 180.

72 *Jackson v. Union Marine Insurance Co. Ltd.,* LR 10 CP 125.

for carriage to San Francisco. She sailed on 2 January, but on the 3rd ran aground in Carnarvon Bay. She was got off by 18 February and was taken to Liverpool where she was still under repair in August. On 15 February the charterers repudiated the contract.

The pivotal question for consideration was whether the charters justified in throwing up their contract instead of waiting until the ship was repaired and then loading her. It was held that the delay (six weeks to refloat and six months to complete repairs) was so long as to put an end, in a commercial sense, to the commercial speculation. This was so held despite the stipulation "dangers and accidents of navigation excepted".

Dahl v. Nelson, Donkin and Co. (1881)[73]

The doctrine of frustration was carried a step forward by propounding the theory of implied term in 1881, *Dahl v. Nelson, Donkin and Co.,* "The meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intended regarding it), but that which the p[arties, as fair and sensible men would presumably have agreed upon if, having such possibility in view, they have made express provision as to their several rights and liabilities in the event of its occurrence……."

Herne Bay Steam Boat Co. v. Hutton (1903)[74]

There was further development in what are commonly called coronation cases (relating to the coronation of King Edward

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73 *Dahl v. Nelson, Donkin and Co.,* 6 AC 38.
74 *Herne Bay Steam Boat Co. v. Hutton,* (1903) 2 KB 683.

VII) in *Krell v. Henry*[75] in 1903. The facts of the case were: The defendant agreed to hire a flat from the plaintiff for June 26 and 27, 1902; the contract contained no reference to the coronation processions, but they were to take place on those days and to pass the flat. The processions were cancelled. Two-thirds of the rent had not been paid when the processions were abandoned and the Court of Appeal held that the plaintiff could not recover it. The Court considered that the procession and the relative position of the flat lay at the foundation of the agreement. The contract was therefore discharged. A contract may be discharged even though it has not become illegal or literally impossible to perform, if later events destroy "some basic, though tacit assumption on which the parties have contracted". This principle seems to be the basis of *Krell v. Henry*, and of some of the other coronation cases. But these are the only cases in which this principle forms the sole ground of decision; and even they have been doubted in the House of Lords. Normally a party cannot rely on frustration merely because supervening events prevent him from putting the subject matter to a use intended by him and contemplated by the other party. These coronation cases may be contrasted with the case of *Herne Bay Steamboat Co. v. Hutton* of the same year 1903. The facts of the case were: The defendant chartered from the plaintiff the S.S. Cynthia for June 28, 1902 for the express purpose of taking payment passengers to see the Coronation naval review at Spithead and to tour the fleet. The review was cancelled, but the fleet remained. The Court of Appeal refused to hold the defendant discharged. They did so, partly on the ground that a tour of the fleet was still possible, but mainly because they considered that it was

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[75] *Krell v. Henry,* (1903) 2 KB 740.

the defendant's own venture and it was at his risk. The Court pointed out that if the existence of a particular state of things is merely the motive or inducement to one party to enter into the contract, as distinct from the basis on which both contract, the principle cannot be applied. And the examples was given of one who hires a vehicle to take himself and a party to Epsom to view the races on Derby day; he will not be discharged if the races are cancelled, for his purpose is not the common foundation of the contract to hire the vehicle. The difficulties of construction which arise are illustrated by contrasting *Krell v. Henry*[76] with *Herne Bay Steamboat Co. v. Hutton*[77]. The same judges who decided *Krell v. Henry* had already refused in *Herne Bay Steamboat Co. v. Hutton* to regard a somewhat similar contract as frustrated. In that case an agreement was made that the plaintiffs' ship should be 'at the disposal of' the defendant on 28 June to take passengers from Herne Bay 'for the purpose of viewing the naval review and for a day's cruise round the fleet'. The review was later cancelled, but the fleet remained at Spithead on 28 June. It was held that the contract was not discharged. The case is not easy to distinguish from *Krell v. Henry*, but perhaps the explanation is that the holding of the review was not the sole adventure contemplated. The cruise round the fleet, which formed an equally basic object of the contract, was still capable of attainment. So finally a distinction reflects a difficulty that frequently occurs when the doctrine of frustration falls to be applied to a contract that is not in fact capable of performance. The doctrine is certainly applicable if the object, which is the foundation of the contract, becomes unobtainable, but the judges are equally insistent that the motive of the parties is not subject of inquiry. That

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76 *Krell v. Henry,* (1903) 2 KB 740.

77 *Herne Bay Steamboat Co. v. Hutton,* (1903) 2 KB 683.

the distinction, however, between motive and object is not always clear is apparent from the *Herne Bay's* case:

"Suppose, for example, that a car is hired in Oxford to go to Epsom on a future date which in fact is known by both parties to be Derby day. If the Derby is subsequently abandoned, the question whether the contract is discharged or not depends upon whether the court regards the race as the foundation of the contract, or merely as the motive, which induced the contract. Must the case be equated with Krell v. Henry or with *Herne Bay Steamboat Co. v. Hutton.*"[78]

***Krell v. Henry (1903)*[79]**

Lord Wright has said that the case of *Krell v. Henry* is certainly not one to be extended: it is particularly difficult to apply where…….. the possibility of the event relied on as constituting a frustration of the adventure …… was known to both parties when the contract was made, but the contract entered into was absolute in terms as far as concerned that known possibility".[80]

These cases arose when the coronation of King Edward VII was postponed because of the illness of the King. Many contracts had been made in anticipation of the coronation; e.g., for the hire of rooms, or of seats on stands, from which the hirers expected to be able to watch the processions which had been planned.

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78 Cheshire Fifoots and Furmston, 11th Edn., pp.559-560, *Law of Contract*,.

79 *Krell v. Henry,* (1903) 2 KB 740.

80 *Maritime National Fish Ltd. v. Ocean Traders Ltd.*, 1935 AC 524.

In December 1901, it was announced that the coronation of King Edward VII was to take place on June 26, 1902. On that day, there was to be procession from Buckingham Palace to Westminster Abbey and back; this was referred to as “the Coronation Procession”. On the following day, there was to be a second procession called “the Royal Progress”, the highlight of which was to be a visit to the City of London. Maps showing the routes of both processions were published in the press. On the day after the Royal Progress there was to be a naval review at Spithead. The king fell ill on June 24, and at 10 a.m. on that day the decision was taken to operate on him for a form of appendicitis. After recovering from the operation, the King was crowned on August 9, and the procession on that day followed the same route as that which had originally been planned for June 26. Evidently, however, the King had not regained sufficient strength to take part in a second procession on that day following his coronation (which in any event was a Sunday); and for some time the fate of the Royal Progress was in doubt, it was originally said to have been “abandoned”, though the same announcement added that the King “hope[d] to be able to drive through some of the streets South of the Thames in the autumn. The date for this event was not fixed until September 20, when it was announced that it would take place on October 25; this announcement added that “the precise route will be announced later”. It was finally announced on October 7, when it became clear that the route to be followed on October 25 would cover much, but not all, of the same ground as that which would have been covered by the Royal Progress as originally planned for June 27. Of particular interest to readers of the coronation cases are the facts that both the original and the revised routes traversed Pall Mall, but that, while the original route included St. James’s

Street, that street was omitted from the revised route. The revised procession duly took place on October 25, but it must have been a less colorful, and no doubt a less profitable, occasion than the originally planned Royal Progress would have been in June; for by October many of the foreign dignitaries who were to have participated in the event, as well as many of the foreign tourists who were expected to have paid to watch the Royal Progress, would have returned to their homes. The question was how the losses resulting from the postponement and curtailment of the planned celebrations were to be allocated.

The cases on this subject fall into two groups: those in which the procession had already been cancelled when the contracts were made, and those in which the cancellation of the procession came after the conclusion of the contracts. In the latter group of cases, no attempt was ever made to distinguish between cases in which at the time of contracting the King may already have been ill but his illness had not been diagnosed, and those in which he fell ill only after the contract was made. Speculation on the former point could have given rise to great uncertainty and it seems that lawyers took account only of the easily verifiable fact whether, when the contract was made the cancellation or postponement had already been announced.

This (much larger) group of cases concerns contracts made before the cancellation or postponement of the planned festivities. Where the contract expressly provided for these possibilities, the doctrine of discharge was excluded.

Where the contract contained no such express provisions, the question whether it was discharged by frustration of

purpose gave rise to more difficulty. *Krell v. Henry*[81] is usually regarded as the leading case, even though its facts present some highly unusual features. Mr. Krell, who had rooms at 56A, Pall Mall, overlooking the routes of both processions, had gone abroad in March 1902 and instructed his solicitor to let the rooms. In June, Mr. Henry saw an announcement in the windows of the rooms, stating that they were to be let for viewing the coronation processions. By an exchange of letters between him and Mr. Krell's solicitor on June 20, Mr. Henry agreed to take the rooms for "the days but not the nights" of June 26 and 27, for a price of £75; of this sum, £25 was paid on June 20, and the balance was to be paid on June 24. These letters made no reference to the coronation, and in this respect *Krell v. Henry* is unique among the coronation cases. It is also unique in its payment provisions in that part of the money promised by Mr. Krell was paid before the processions were cancelled, while the balance did not become due until after that event: it was due "on" June 24, and this meant that Mr. Henry was not bound to pay it till midnight, while the cancellation occurred at 10 a.m., on that day. It was held that the contract had been discharged by the cancellation of the processions, so that Mr. Krell was not entitled to the £50, which was to have been paid on June 24. On the other hand, Mr. Henry abandoned his counterclaim for repayment of the £25 already paid, no doubt because the Court of Appeal had in the meantime decided that money paid before the procession had been cancelled could not be recovered back by the payer.

The debate to which *Krell v. Henry*[82] gave rise is however concerned, not with such details of adjustment in

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81 *Krell v. Henry,* (1903) 2 KB 740.
82 *Krell v. Henry,* (1903) 2 KB 740.

consequence of discharge, but with the more fundamental question whether the doctrine of discharge should have been applied at all in the circumstances of the coronation cases. When those cases were decided, they stood for a new principle: namely that, even though performance had not become impossible, the contracts were discharged because their purpose, of enabling the hirers to watch the processions (or one of them) had been frustrated. On the one hand, there were obvious dangers in such a rule since it was, in theory, capable of extension to many cases in which a contract had simply, as a result of supervening events become for one of the parties a bad bargain.

The most elaborate judicial discussion is in the American Northern Indiana case, where Posner, J., advances two principal arguments in support of *Krell v. Henry*. These may be labeled the insurance argument and the postponement argument. The insurance argument is that the owner of the rooms was in a better position than the hirer to cover the risk by insurance and so should not be entitled to the promised payment.

The essence of Posner, J,'s second, or "postponement", argument is that the owner of the rooms still had them at his disposal when the coronation eventually did take place; that he could make his anticipated point by again letting them room then, and that it would therefore be unjust to allow him to recover, or to keep, money promised, or paid, to him in respect of the originally planned processions.

Difficulty arises in reconciling *Krell v. Henry*[83] with a number of other cases, either actual or hypothetical, in which it has

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83 *Krell v. Henry,* (1903) 2 KB 740.

been held or said that the contracts would not be discharged. One such hypothetical case is the example given in *Krell v. Henry* itself of a contract to take a cab to Epsom on Derby Day "at a suitably enhanced price." Such a contract, it is said, would not be discharged if the Derby were cancelled.

There are also many actual cases, which have rejected the argument of discharge by frustration of purpose. But in the present context the most interesting contrast with *Krell v. Henry* is provided by another of the coronation cases. This was *Herne Bay Steamboat Co. v. Hutton,*[84] where a contract had been made for the hire of a pleasure boat at Spit head on June 28, 1902, "for the purpose of viewing the naval review and for a day's cruise around the fleet; also on Sunday, June 29th, for similar purposes". The hirer had apparently intended to sell seats on the boat to those who wished to see the naval review, and no doubt suffered loss in consequence of the cancellation of the review, even though the fleet remained at Spithead. The court regarded the contract as one for the hire of a boat for sightseeing, and held that the fact that one of the anticipated attractions (the review) had failed to materialize was not a ground of discharge.

Even if it is accepted that there should be no discharge in any of the hypothetical and actual examples considered above, *Krell v. Henry*[85] is properly regarded as falling on the other side of the line. The contract in that case was not simply one, which granted license to use the rooms at an unusually high price. It was a contract to provide facilities

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84 *Herne Bay Steamboat Co. v. Hutton,* (1903) 2 KB 683.
85 *Krell v. Henry,* (1903) 2 KB 740.

for viewing the coronation processions would not take place, or that they could be viewed from the rooms. In this respect, the contract differed from the contract that is made by buying a theatre or concert ticket; performance of such a contract would become impossible if supervening events led to the cancellation, of the play or concert. In *Krell v. Henry* there was no such impossibility, or (as the Restatement 2nd puts it) "no impediment to performance by either party." But it was the common purpose of both the parties that facilities for viewing the processions should be provided: in the words of Vaughan Williams, L.J., the provision of such facilities was the crucial point "as much for the lesser as the hirer."

The naval review may have formed the hirer's principle inducement to enter into the contract, but the continued presence of the fleet at Spithead also provided a considerable and unusual attraction, and it was one of the purposes of the contract to give the hirer the opportunity of taking advantage of this attraction for commercial purposes. In *Krell v. Henry*, by contrast, it was not part of the contractual purpose that Mr. Henry should be able to look out of the window to watch the ordinary London traffic, which continued to pass down Pall Mall on the two days in question. *Krell v. Henry* seems, with respect, to have been correctly decided on the basis that it was the common purpose of both parties that facilities for watching the processions were to be provided under the contract, and the cancellation of the processions had prevented the achievement of that common purpose (though literal performance of the contract had not become impossible).

In this sense, formulations of the doctrine in terms of the frustration of the purpose of both parties are preferable to

those (occasionally found), which refer to the frustration of the purpose of one party only. The point can be illustrated by supposing that, in *Krell v. Henry*,[86] the coronation had taken place as planned but Mr. Henry had fallen ill and so been unable to watch the processions. In that case, his purpose might have been frustrated, but the same could not have been said of Mr. Krell's purpose: that purpose, being the provision of viewing facilities, would have been accomplished. Accordingly it is submitted that, on such facts, the contract should not have been discharged.

In the United States, there are of course no coronation cases. A somewhat similar situation did, indeed, arise in January 1985, when a spell of unusually cold weather led to the cancellation of the parade that was to have marked the inauguration of President Reagan for his second term of office. But no litigation resulted as money which had been paid by would-be spectators was repaid voluntarily. It is not inconceivable that the drafting of the relevant contracts was affected by the English coronation cases, which are widely discussed in American legal literature.

In cases of frustration of purpose, there is no such prevention at all, but discharge may nevertheless occur because the literal performance of one part's duty has become useless to the other. The fact that the coronation was merely postponed, not permanently cancelled, does not affect the point.

In at least, most of the coronation cases the facilities for viewings were to be provided on a single day or on two specified days. The crucial fact in these cases was not the

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[86] *Krell v. Henry,* (1903) 2 KB 740.

length of the delay (of about six weeks in relation to one of the processions and of about four months in relation to the other) but the fact that the processions did not take place on the only days on which the facilities were to be made available.

In the United States, the distinction between discharge by impossibility (or impracticability) was at one time so sharply drawn that in the original version of the Restatement of the two concepts were discussed at widely separate points. The reason for this arrangement may have been that discharge by mere frustration of purpose was formerly viewed in the United States with some hostility, when this hostility subsided, the arrangement of differences between the two grounds of discharge and to attach insufficient significance to the features, which they had in common. The Restatement 2nd accordingly treats them in the same Chapter, while devoting separate section to discharge by supervening "Impracticability" and by "Frustration." English law, too regards them as illustrations of a single principle of discharge by supervening events; but the distinction between them is nevertheless significant not only from an analytical, but also from a practical point of view, for the rules which govern discharge are in some respects stricter in cases of supervening frustration of purpose then they are in cases of supervening impossibility.

The party that claims that a supervening event frustrated its purpose must meet four requirements, only the first of which is different from those of impracticability. First, the event must have "substantially frustrated" that party's "principal purpose". Second, it must have been "a basic assumption on which the contract was made" that the event would not occur. Third, the frustration must have resulted without the

fault of the party seeking to be excused. Fourth, that party must not have assumed a greater obligation that the law imposes.

Furthermore, despite the similarity of the requirements for the two doctrines, courts have been much more reluctant to hold that a party has been excused on the ground of frustration than on the ground of impracticability. Parties seeking excuse on this ground have found that first and fourth requirement particularly troublesome.

Under the first requirement, a party must show that its principal purpose in contracting has been substantially frustrated. Courts have raised two obstacles to a party's doing so. First, they have viewed the affected party's principal purpose in broad terms. The mere fact that some exceptional event has prevented a party from taking advantage of the transaction in the particular way expected may not suffice to satisfy the requirement of substantial frustration if the party can turn the bargain to its advantage in some other way. Second, courts have insisted that the frustration be nearly total. The mere fact that what was expected to be a profitable transaction has turned out to be a losing one is not enough.

Under the fourth requirement, the party seeking to be excused on the ground of frustration must not have assumed a greater obligation than the law would impose. Even if a party can show that its principal purpose has been frustrated, a court may refuse to excuse the party on the ground that the party assumed the risk of the occurrence of the frustrating event. Sometimes a court does this on the basis of contract language.

Sometimes a court concluded that a party assumed the risk of the occurrence of the frustrating event merely because the event was foreseeable. In one case, an elderly man who lived in a home for the aged on a trial basis paid a lump sum of $ 8,500 to be accepted as a permanent resident. When he died only three days later, before his permanent status had begun, his executors unsuccessfully sought return of the payment on the ground of frustration. “Frustration is no defense if it was reasonably foreseeable.... That death may at any unexpected time overcome a man of decedent’s age, 84 years, is by common observation readily classified as “reasonably foreseeable’.”

The examples discussed in the preceding sections involve impracticability or frustration resulting from an even that occurs after the time of agreement. However, there is no reason why a party should not also be excused on the ground of impracticability or frustration existing at the time of the agreement.

Excuse on the ground of existing, as opposed to supervening, impracticability, is well recognized. For example, as the commentary to the Code explains, the rule that excuses the seller in the case of casualty to identified goods ‘applies whether the goods were already destroyed at the time of contracting without the knowledge of either party, or whether they are destroyed subsequently. In order to be excused on the ground of existing impracticability, a party must meet the four requirements that are imposed in cases of supervening impracticability. In addition the party must show that it neither knew nor had reason to know of the facts that made performance impracticable.

The effect of supervening impracticability or frustration on the excused party is usually to discharge that party's remaining duties of performance. The effect of existing impracticability or frustration on the excused party is usually to prevent any duty of performance on that party's side from arising.

The excused party's failure to perform because of impracticability or frustration affects the other party's duties of performance in the same way as if the excused party had broken the contract. If the failure is material, the other party can suspend performance. If an appropriate time for the excused party to cure has passed, the other party can terminate the contract.

A prospective failure of performance due to impracticability or frustration has a similar effect. The fact that one party's anticipated failure to perform will be excused on the ground of impracticability or frustration does not prevent the other party from justifiably suspending performance and from terminating the contract. But the other party cannot recover damages for breach.

Difficult questions arise when it is clear that the impracticability or frustration will be only temporary. First, when is the other party justified in terminating the contract? Second, if the other party does not terminate the contract, when is the excused party justified in refusing to perform after the impracticability or frustration has ceased?

The subject matter of the contract may not be destroyed, yet the purpose of the contract may be frustrated. Conceivably, the subject matter may be physically intact, yet the purpose of the contract may become impossible of

performance, e.g., coronation cases. Though the room to be let out was physically intact and available, yet the purpose of the contract – viewing the coronation procession on the specified date, was frustrated due to the supervening illness of the King and consequent cancellation of the coronation procession on that date.

This may also happen in a case where a contract relating to transfer of interest in immovable property, where the subject-matter of the contract – the specific immovable property, may be physically intact, but the purpose of the contract – transfer of interest therein, may be frustrated, consequent on subsequent requisition or compulsory acquisition of that property by the Government in exercise of its statutory powers.

This may also happen in case of contract for sale of goods, where the sole source of production of the specified goods dries up for no fault of the seller. If it is possible for the seller to tap an alternative source of supply and perform the contract, plea of frustration will not prevail. However, it is the specific source of supply of the goods i.e. the subject matter of the contract, is specified, and that dies up for no fault of the seller, the contract stands frustrated. However, if the source of supply is the part of the description of the goods i.e. the subject matter of the contract, and it dries up, it will not result in frustration of contract. Supreme Court of India in *Ganga Saran v. Firm Ram Charan*,[87] "The defendant entered into contract with the plaintiff under which he was to supply 61 bales of cloth of certain specification manufactured by the New Victoria Mills, Kanpur. The agreement ran as follows: 'We shall continue sending goods

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87 *Ganga Saran v. Firm Ram Charan,* AIR 1952 SC 9.

as soon as they are prepared to you up to Magsar Badi 15 Sambat 1998. We shall go on supplying gods to you of the Victoria Mills as soon as they are supplied to us by the said Mill. We shall go on delivering the goods to you up to Magsar Badi 15 out of the goods noted above which will be prepared by the Mill. As the bales were not supplied to the plaintiff sent a telegraphic notice on 20-11-41 to the following effect: 'give delivery of 61 bales, through Bank, otherwise suing within 3 days'. The plaintiff did not receive any reply and therefore instituted the suit for recovery of loss sustained by him due to rise in market price. The main defence was that the contract had been frustrated by circumstances beyond their control.

Held that on a true construction of the contract the delivery of the goods was not made contingent on their being supplied to the defendant by the Victoria Mills. The parties never contemplated the possibility of the goods not being supplied at all. The words "prepared by the Mill" were only description of the goods to be supplied and the expressions "as soon as they are prepared" and "as soon as they are supplied to us by the said Mill" simply indicated the process of delivery. Even apart from the construction of the agreement the defendant having admitted in his evidence that he was in a position to supply his bales of the contracted goods at the time when the breach of contract took place, it could not be held "that the performance of the contract had become impossible unless he proved that the failure on his part was due to circumstances beyond his control." Commenting on this case, Trietel in Frustration & Force Majeure, [88] says, "In an Indian case i.e. *Ganga Saran*

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[88] Trietel, 1994 edition, p. 133, *Frustration & Force Majeure.*

v. Ram Charam Ram Gopal[89], where the factory belonged to a third party who failed to make the agreed delivery. For the situation where the contract contains no reference to the factory, a contract was made for the sale of cloth from the Victoria Mills, a factory belonging to a third party. These words were said to be "purely descriptive" and, although the point did not arise for decision, it seems that the destruction of the factory would not have discharged the contracts."

The point may be illustrated by reference to contracts for the sale of goods to be manufactured by the seller. If the contract provides for the sale of goods to be manufactured by the seller in his factory, then the factory is essential for performance and its destruction will discharge the contract. On the other hand, the *Turner v. Goldsmith*[90] a contract was made for the sale of goods to be "manufactured or sold" by the seller. It was held that the contract was not only as a manufacturer but also as a dealer in goods of the kind in question.

The purpose of the contract can be frustrated by the order of the Court, e.g., permanent injunction to a party to the contracting preventing it from performing the contract – even temporary injunction to that effect, lasting till the final disposal of the suit – which takes a long time – so long as to render the performance of the contract radically different from what it was, contemplated by the parties at the inception of the contract.

Conceivably, a situation may arise where the subject-matter of the contract is not destroyed, the purpose of the contract

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89 *Ganga Saran v. Firm Ram Charan,* AIR 1952 SC 9.
90 *Turner v. Goldsmith* [1891] 1 QB 544.

is not in jeopardy, but the ordinary and accepted method and manner of performing the contract is so affected by supervening events that performance becomes impossible, for no fault of any party to the contract. Take the example of contract of transport of goods by ship. The ship chartered for the purpose is available – ready to sail – having berthed at the port and readied itself for the voyage, the goods to be transported are ready having been delivered at the dockyard for being loaded on the ship – but the loaders have gone on strike – having the monopoly of loading ships at that port as union members, no outsiders or causal labour allowed to do the job. What happens in that situation? The contract stands frustrated.

To save such situations, as listed above, from the disastrous consequences of frustration – automatic dissolution of contracts – the doctrine of *force majeure* comes into play and the parties by specific stipulation incorporated in the contract, called *force majeure* Clause, can stipulate that such contingencies occurring by way of supervening events will not result in frustration of contract. The parties can device means of keeping contract in animated suspension to be reactivated when the obstruction caused by such events is removed at some future date, e.g., in coronation cases, the viewing of the coronation procession was possible when the procession did take place after the King recovered from his illness – the cancellation was transformed into postponement. The parties could have stipulated that the contract would not be frustrated when the coronation procession was cancelled consequent on the illness of the King but kept in suspense and come back in operation on subsequent holding of the procession at a future date after recovery of the King from his illness.

Tamplin SS Co. v. Anglo-Mexican Co. (1916)[91]

1914 – 1918 War resulted in a crop of cases where the Court has to consider the applicability of Law of Frustration of Contract such contracts affected by war conditions. The dislocation of business caused by the war raised the same question as those raised by cases previously considered under the head of impossibility. 'When this question arises in regard to commercial contracts', said Lord Loreburn in the *F.A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products, Ltd.,* 'the principle is the same, and the language as to "frustration of the adventure" merely adapts it to the class of cases in hand'. The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made. The facts of that case were: "the Steamship F.A. Tamplin was chartered by a time charter-party for five years from December 4, 1912 to December 4, 1917. In February 1915 the Government requisitioned the ship for use as a troopship and made certain structural alterations to her for this purpose. The charterers were willing to go on paying the agreed freight under the charter-party, but the owners claimed that the contract had been frustrated by the requisition as they wished to obtain a larger amount of compensation from the Crown." On these facts, the House of Lords, by a bare majority, held that the contract still continued. The interruption was not of sufficient duration to make it unreasonable for the parties to go on. There might be many months during which the ship would be available for commercial purposes before the five years expired. The passage from the speech of Lord Loreburn in that case

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91 *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products, Ltd.*, [1916] 2 AC 397.

considered being the classic exposition of the basis of the doctrine of frustration as an implied term was:

> "A Court can and ought to examined the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, thought it be not expressed in the contract ....." Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform impossibility. Sometimes it is put that the parties contemplated a certain state of things, which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract, which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted..... Were the altered conditions such that, had they though of them, they would have taken their chance of them, or such that as sensible men they would have said, 'If that happens, of course, it is all over between us'?"

The fact that the charteres were still willing to pay the freight (hoping to receive the higher rate of compensation paid by the Government) undoubtedly weighed with the

majority. Lord Parker of Waddington thought that the doctrine of frustration could not apply to a time charter which 'does not contemplate any definite adventure or object to be performed or carried out', but this opinion was rejected in the Bank Line case.

Bankline Ltd. v. Arthur Capel & Co. (1919)[92]

Turning to the Bank Line case, the facts of that case were: "In February 1915, the appellants agreed to charter to the respondents the steamship Quito for a period of twelve months from the time the vessel should be delivered and placed at the disposal of the respondents. It was provided in the charter-party that (i) if the steamer had not been delivered by April 30, 1915, the charterers were to have the option to cancel the contract or to proceed with it, and (ii) 'Charterers to have option of canceling this charter-party should steamer be commandeered by Government during this charter'. The steamer was not delivered by April 30, and, on May 11, before delivery, she was commandeered by the Government and not released until September. She was then sold by the appellants, and the respondents sued for non-delivery, having never exercised their options"

On these facts, "The House of Lords held that the contract had been frustrated. The clauses in the charter-party were not intended to place the ship owner's indefinitely at the charterers' mercy, to oblige them to deliver however long the delay". Lord Haldane, who dissented, was of the opinion that there was no frustration; the requisition was not of such a permanent character as to make the terms of the charter-party wholly inapplicable. These differences of

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92 *Bankline Ltd. v. Arthur Capel & Co.,* (1919) AC 435.

opinion within the highest tribunal show that cases of frustration raise most difficult questions of fact and principle. In particular, where the execution of the contract is delayed by the happening of an external event, the tests to be applied have been stated by Lord Summer in diverse terms:

> "Delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure, which is clearly within the contemplation of the parties..... so much so as to be often the subject of express provision. Delays such as these may very seriously affect the commercial object of the adventure, for the ship's expenses and overhead charges are running on..... None the less this is not frustration. The delay must be such as 'to render the adventure absolutely nugatory'[93], to make it unreasonable to require the parties to go on'[94], 'to destroy the identity of the work or service when resumed with the work or service when interrupted,'[95] 'to put an end in a commercial sense to the undertaking'."[96]

"The use of such phrases indicates that delay by itself is insufficient, and this is clearly shown in cases concerning building contracts, where a hold-up of work inevitably

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93 *Bensuade & Co. v. Thames and Mersey Marine Insurance Co.,* (1897) 1 QB 29, per Lord Esher M.R. at p. 31: (1897) AC 609, at pp.611, 612, 614.

94 *Metropolitan Water Board v. Dick Kerr & Co. Ltd.,* (1918) AC 119, per Lord Atkinson at p. 131. *F.A. Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.,* (1916) 2 AC 397 per Lord Loreburn at p. 405.

95 *Metropolitan Water Board v. Dick Kerr & Co. Ltd.,* (supra), per Lord Dunedin at p.128; *Bank Line Ltd. v. Capel (A) & Co.* (1919) AC 435, per Lord Summer at p.460.

96 *Jackson v. Union Marine Insurance Co. Ltd.,* (1874) LR 10 CP 125.

increases the builder's costs." ……."Even though the occurrence of the frustrating event was contemplated by the parties, as in the Bank Line case, the Court may hold them discharged. If frustration were really dependent upon the intention of the parties, the natural inference would be that they took the risk of events, which were present to their minds at the time they made the contract. But although it has been so held in some cases, in other it has been held that, if frustration has occurred, it is no bar that the event causing it was foreseen."[97]

While commenting on the Bank Line case, has this to say on the point: "…….The contract was in substance if not in form, an April to April charter; and to hold the parties to a September to September charter would be to impose substantially different obligations from those undertaken. The normal inference that parties take the risk of foreseen events was displaced by the special terms of the contract.[98]

Chitty[99] On Contracts, 25th Edn., commenting on these two cases, Tamplin case and Bank Line case has stated: "The application of the doctrine of frustration will always depend on the particular facts of each case, but it is difficult to reconcile the two cases just discussed, except on the basis that in the Tamplin case the interruption was of a time charter for five years, while in the Bank Line case the interruption had a more serious effect, since the time charter was for the must shorter period of one year." ……the main thing to be considered is the probable length of the total deprivation of the use of the chartered ship

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97 *Tatem Ltd. v. Gamboa,* (1939) 1 KB 132, at p. 138; *Ocean Tramp Tanker Corpn. V. V/o. Sovfracht* (The 'Eugenia'), (1964) 2 QB 226, at p. 239.

98 Trietel, 7th Edn., p. 699, *The Law of Contract.*

99 Chitty, 25th Edn., *Law of Contracts.*

compared with the unexpired duration of the charter-party. .....The possibilities as to the length of the deprivation and not the certainty arrived at after the events are also material. The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay, and had to decide what to do.[100] This approach to the problem of requisitioning is supported by the case of *Port Line Ltd. v. Ben Line Steamers Ltd*.[101] where Diplock, J., held that a time charter-party for 30 months (of which 17 had expired) was not frustrated by a government requisitioning which was expected to last, only about three months; for 10 months after the end of the requisitioning the vessel was available to the charterer. In this case the ship was requisitioned under the prerogative of the Crown, which meant that the Crown could retain the ship only for such a period as was necessary for the defence of the realm".

Russkoe & Co. v. John Stirk & Sons Ltd. (1922)[102]

1922 saw the development of the doctrine that frustration may result if the foundation of the contract disappeared, in *Russkoe & Co. v. John Stirk and Sons Ltd.*, Lord Atkin said: "There are many positive rules of law imposed upon contracting parties which govern the whole creation, performance and dissolution of a contract which are quite independent of the intention of the parties. For my part I see no reason why, in a certain set of circumstances which

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100 *The Bankline* case, (1919) AC 435, 454; *Court Line Ltd. v. Dant & Russell Inc.* (1939) 3 All. E.R. 314, 318. It is a question of law whether the delay has frustrated the contract; *Trade and Transport Inc. v. Iino Kaiun Kaisha Ltd.*, (1973) 1 WLR 210, 221.

101 *Port Line Ltd. v. Ben Line Steamers Ltd.,* (1958) 2 QB 146.

102 *Russkoe & Co. v. John Stirk & Sons Ltd.,* (1922) 10 L1 214.

the Court finds must have been contemplated by both parties as being of the essence of the contract and the continuance of which must have been deemed to have been essential to the performance of the contract, the Court should not say that when that set of circumstances ceases to exist, then the contract ceases to operate."

Larrinaga & Co. v. Societe Franco-Americaine (1923)[103]

Krell v. Henry[104] was criticized in *Larrinaga & Co. v. Societe Franco-Americaine* des Phosphates de Medulla, the facts of the case were: "A contract was made in 1913 for the carriage of six cargoes of phosphates between March 1918 and November 1920. After the end of the First World War, the carriers argued that the contract was frustrated because of the altered shipping conditions then prevailing." The House of Lords rejected this view. A contract of this kind, not to be performed for many years, was essentially speculative. Each party deliberately took the risk that conditions might alter. It was a form of insurance. Cheshire and Fifoot in their Law of contract, 10th edition, page 513, refer to the criticism of the judicial decision of *Krell v. Henry* in the above case of Larrinaga. So also Chitty On Contracts, 24th edition in para 1426: Lord Wright has said that the case of *Krell v. Henry,* is certainly not one to be extended: it is particularly difficult to apply where……. the possibility of the event relied on as constituting a frustration of the adventure …… was known to both parties when the contract was made, but the

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103 *Larrinaga & Co. v. Societe Franco-Americaine* des Phosphates de Medulla (1923) 92 LJKB 455.

104 *Krell v. Henry,* (1903) 2 KB 740.

contract entered into was absolute in terms as far as concerned that know possibility".[105]

This extension of the doctrine of discharge has not escaped criticism since it could, if misapplied, lead to the situation in which a party would be entitled to relief merely because a supervening change of circumstances had turned the contract, for that party, into a very bad bargain. But these criticisms have not prevailed and the doctrine of discharge is now generally thought to have been correctly applied to coronation cases such as *Krell v. Henry*[106]; for it can fairly be said that the hirer in that case would have suffered unacceptable hardship if he had been held to his contract in the altered circumstances. But English cases provide few other illustrations of discharge on the ground of frustration of purpose, and they seem to have rejected the converse notion of discharge on the ground of "impracticability": i.e., on the ground that supervening events have made performance more expensive or otherwise more onerous for the party claiming discharge. Thus, in the *British Movietonews and Davis Contractors* cases, pleas of discharge on such grounds were rejected; and a number of dicta in the House of Lords similarly adopt a restricted approach to the doctrine. In this vein it has, for example, been said that "an increase of expense is not a ground of frustration, that the doctrine of frustration was only to be applied "within very narrow limits," that "it by no means follows that disappointed expectations lead to frustrated contract, and that the doctrine was "not lightly to be invoked

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105 *Maritime National Fish Ltd. v. Ocean Traders Ltd.,* (1935) AC 524, 529; see also Lord Finlay's observation on *Krell v. Henry* in *Larrinaga & Co. Ltd. v. Societe Franco-Americaine Des Phosphates,* (1923) 39 TLR 316, 318.

106 *Krell v. Henry,* (1903) 2 KB 740.

to relieve contracting parties of the normal consequences of imprudent commercial bargains.[107]

This approach to the doctrine of discharge reflects the importance, which the English Courts have come, in the interests of commercial certainty, to attach to the principle of sanctity of contract. It can fairly be described as a trend to restrict the operation of the doctrine after its initial period of growth; and in the English cases the trend is illustrated by an increasing amount of negative evidence. The First World War did indeed given rise to a significant number of cases in which contracts were held to have been discharged by supervening impossibility. By contrast, there were hardly any reported Second World War cases in which contracts were held to have been discharged by supervening impossibility, as opposed to supervening illegality.

There is now a marked judicial reluctance to apply the doctrine in such circumstances. It has been suggested above that this reluctance is primarily based on the importance now attached to the principle of sanctity of contract.

The tendency of contracting parties to “draft out” possible causes of frustration by making express provisions either for specific obstacles to performance, or for such obstacles in general: for example, “Suez clauses” which began to make their appearance after the first Suez crisis, and in the *force majeure* and similar clauses.

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[107] Trietel, (1994) pp. 37-38, *Frustration and Force Majeure.*

A contract could also by express provisions vary the normal consequences of discharge. The desire of contracting parties to provide for compromise solutions where supervening events disrupt performance has thus given a further impetus to the process of making express contractual provisions for such events, and this process has tended further to narrow the scope of doctrine of frustration since that doctrine is excluded where the parties have expressly provided for the effects on their contract of the event which has interfered with its performance.

Hirji Mulji v. Cheong Yue Steamship Co. Ltd. (1926)[108]

Next case in chronological order is the case of *Hirji Mulji v. Cheong Yue Steamship Co. Ltd*., the facts of that case case were: "By a charter-party made in November, 1916, shipowners agreed that their ship, the Singaporean, should be placed at the charterers' disposal on March 1, 1917, for ten months. Shortly before the date the ship was requisitioned by the Government. The ship owners thought that she would soon be released, and asked the charterers if they would be willing to take up the charter. The charterers said that they would. The vessel was, however, not released until February 1919, and the charterers refused to accept her. It was contended by the shipowners that the charterers had so conducted themselves as to oust the doctrine of frustration. But the House of Lords held that frustration bring the contract to an end automatically, and could not be waived in this manner. Secondly, the effect of frustration at common law is to release both parties from any further performance of the contract, while leaving intact any legal rights already accrued, or money

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108 *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.,* (1926) AC 497.

already paid, before the frustrating event occurred. All obligations falling due for performance after that time are discharged: all those already due remain undisturbed."

Commenting on this case, Cheshire, Fitfoot and Furmston's Law of Contract, has said: "The rule established at common law is that the occurrence of the frustrating event 'brings the contract to an end forthwith, without more and automatically'."[109]

Treitel in The Law of Contract referred that, "Lord Summer once described the doctrine of frustration as 'a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands'."[110]

Maritime National Fish Ltd. v. Ocean Trawlers Ltd. (1935).[111]

In the case of *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.,* the facts of the case were as follows:

Lord Wright. - The appellants were charterers of a steam trawler the St. Cuthbert which was the property of the respondents. The charter party, dated 25th October 1928, had originally been entered into between the respondents and the National Fish Company Ltd., but was later by agreement taken over by the appellants. It was for 12 calendar months, but was to continue from year to year unless terminated by 3 months' notice from either party, the

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109 Cheshire, Fitfoot and Furmston, 11th Edn., p. 568, *Law of Contract.*

110 Treitel, 7th Edn. p. 713, *The Law of Contract*.

111 *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* (1935) AC 524 : AIR 1935 PC 128.

notice to take effect at the end of one of the years. it was expressly agreed that the trawler should be employed in the fishing industry only; the amount of monthly hire was to be fixed on a basis to include a percentage of the purchase price, and also operating expenses. There was an option given to the charterers to purchase the trawler.

By letters dated 6th and 8th July 1932, exchanged between the appellants and respondents, it was agreed that the charter party as then existing should be renewed for one year from 25th October 1932, but at a rate of monthly hire which was 25 per cent, lower than that previously paid : the amount so agreed came to $ 590.97 per month. It was also then agreed that in the event of the appellants giving notice on or before 25th July in any year that they did not intend to renew, they should further give notice whether or not they intended to exercise the option to purchase. In fact the appellants gave notice on 27th January, 1933, that they did not intend to renew the charter or to purchase the vessel.

When the parties entered into the new agreement in July 1932, they were well aware of certain legislation consisting of an amendment of the Fisheries Act (c. 73 Revised Statutes of Canada, 1927) by the addition of section 69-A, which in substance made it a punishable offence to leave or depart from any port in Canada with intent to fish with a vessel that uses an otter or other similar trawl for catching fish, except under licence from the Minister: it was left to the Minister to determine the number of such vessels eligible to be licensed, and Regulations were to be made defining the conditions in respect of licences. The date of this amending section 69-A was 14th June 1929. Regulations were published on 14th August 1931, former

Regulations having been declared invalid in an action in which the appellants had challenged their validity.

The St. Cuthbert was a vessel, which was fitted with, and could only operate as a trawler with, an otter trawl. The appellants, in addition to the St. Cuthbert, also operated four other trawlers, all fitted with otter trawling gear. On 11th March 1933, the appellants applied to the Minister of Fisheries for licences for the trawlers they were operating, and in so doing complied with all the requirements of the regulations, but on 5th April 1933, the Acting Minister replied that it has been decided (as had shortly before been announced in the House of Commons) that licences were only to be granted to three of the five trawlers operated by the appellants: he accordingly requested the appellants to advise the Department for which three of the five trawlers they desired to have licences. The appellants thereupon give the names of three trawlers other than the St. Cuthbert, and for these three trawlers licences were issued, but no licence was granted for the St. Cuthbert.

In consequence, as from 30th April 1933, it was no longer lawful for the appellants to employ the St. Cuthbert as a trawler in their business. On 1st May 1933, the appellants gave notice that the St. Cuthbert was available for re-delivery to the respondents; they claimed they were no longer bound by the charter.

On 19th June 1933, the respondents commenced their action claiming $590.97 as being hire due under the charter for the month ending 25th May 1933: it is agreed that if that claim is justified, hire at the same rate is also recoverable for June, July, August, September and October 1933.

The main defence was that though no fault, act or omission on the part of the appellants, the charter party contract became impossible of performance on and after 30th April 1933, and thereupon the appellants were wholly relieved and discharged from the contract, including all obligations to pay the monthly hire, which was stipulated.

The defence succeeded before the trial Judge, Doull, J. His opinion was that there had been a change in the law, including the regulations, which completely changed the basis on which the parties were contracting. He though it:

> "not unreasonable to imply a condition to the effect that if the law prohibits the operation of this boat as a trawler the obligation to pay hire will cease."

> He also thought that appellants were not bound to lay up another boat instead of the St. Cuthbert. It seems that the learned Judge proceeded on the footing that the change of law was subsequent to the making of the contract, whereas it was in fact anterior to the agreement of 1932 under which the trawler was being employed at the time the licence was refused. This judgment was unanimously reversed by the Judges in the Supreme Court *en banco*. The Judges of that court rightly pointed out that the discharge of a contract by reason of the frustration of the contemplated adventure follows automatically when the relevant event happens and does not depend on the volition or election of either party. They held that there was in this case no discharge of the contract for one or both of two reasons. In the first place they thought that the appellants when they renewed the charter in 1932 were well informed of the legislation

> and when they renewed the charter at a reduced rate and inserted no protecting clause in this regard, must be deemed to have taken the risk that a licence would not be granted. They also thought that if there was frustration of the adventure, it resulted from the deliberate act of the appellants in selecting the three trawlers for which they desired licences to be issued.

Tatem Ltd. v. Gamboa (1939)[112]

The next case in the chain is: *Tatem Ltd. v. Gamboa*. The facts of the case were: "During the Spanish civil war, the plaintiffs chartered to the defendant, acting on behalf of the Republican Government of Spain, a steamship, for 30 days from July 1, 1937, the ship was to be used for the evacuation of the civilian population from Northern Spain to French ports, and hire was to be at the rate of £250 per day. On July 14, the ship was seized by the nationalists and detained in the port of Bilbao until September 11. in answer to the plaintiffs' claim for hire, the defendant pleaded that the contract had been frustrated." On these facts the court observed: "The high rate of hire clearly showed that possibility of seizure of the vessel was contemplated by the parties at the time they made the contract. Nevertheless it was held that this action had discharged the contract ……Goddard, J., said …….. If the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated."

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112 *Tatem Ltd. v. Gamboa*, [1939] 1 KB 132.

Chitty On Contracts,[113] has said that, "The fact that the parties to the contract actually foresaw the possibility of the event in question, but made no provision for it in their contract, does not necessarily prevent the doctrine of frustration from applying when that event takes place. It is a question of construction of the contract whether the parties intend their silence to mean that the contract should continue to bind in that event, or whether they intend the effect of the event, if it occurs, to be determined by any relevant legal rules.[114] If one party foresaw the risk, but the other did not, it will be difficult for the former to claim that the occurrence of that risk frustrates the contract."[115]

Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd. (1942)[116]

Next case which is a landmark case is *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.* The facts of the case were:

"The appellants chartered to the respondents their steamship Kingswood to proceed to Australia and load a cargo there. Before this could be done, a violent explosion occurred in the boiler of the ship, which resulted in such a delay as would discharge the contract. The cause of the explosion was never ascertained, but the respondents alleged that the appellants had first to establish that it occurred without their fault before they could rely on the

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113 Chitty, 25th edition, *Law of Contracts*.

114 e.g. an intention that if the event were to happen, the parties would "leave the lawyers to sort it out"; *Ocean Tramp Tankers Corporation v. V/O Sovfracht* (The Eugenia), (1964) 2 QB 226, 239.

115 *Walton Harvey Ltd. v. Walter and Homfrays Ltd.,* (1931) 1 Ch. 274.

116 *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*, (1942) AC 154.

doctrine of frustration and so not be liable for breach of contract."

On the facts Lord Wright observe: .....In more recent days, the phrase more commonly used is "frustration of the contract" or, more shortly "frustration". "Frustration of the contract", however, is an elliptical expression. The fuller and more accurate phrase is "frustration of the adventure or of the commercial or practical purpose of the contract". This change in language corresponds to a wider conception of impossibility, which has extended the rule beyond contract which depends on the existence, at the relevant time, of a specific object, as in the instances given by Blackburn, J., to cases where the essential object does indeed exist, but is condition has by some casualty been so changed as to be not available for purpose of the contract, either at the contract date or, if no date is fixed, within any time consistent with the commercial or practical adventure. For the purposes of the contract the object is as good as lost. Another case, often described as frustration, is whereby State interference or similar overriding intervention, the performance of the contract has been interrupted for so long a time as to make in unreasonable for the parties to be required to go on with it. Yet another illustration is where the actual object still exists and is available, but the object of the contract as contemplated by both parties was its employment for a particular purpose, which has become impossible, as in the Coronation cases. In these similar cases, where there is not, in the strict sense, impossibility by some casual happening, there has been so vital a change in the circumstances as to defeat the contract. What Willes, J., in *Inchbald's* case[117] described

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[117] *Inchbald's* case, (1864) 17 CBNS 733.

as substantial performance is no longer possible, the common object of the parties is frustrated. The contract has perished any rights or liabilities subsequent to the change. The same is true where there has been a vital change of the law, either statutory or common law, operating on the circumstances as, for instance, where the outbreak of war destroys a contract legally made before the war, but which, when war breaks out, cannot be performed without trading with the enemy. I have given this bare catalogue to illustrate the application in practice of the doctrine of frustration, in order to show how wide and various is the range of circumstances to which it may extend, and how manifold are the complications involved in the rule laid down by the Court of Appeal that there is an affirmative onus of disproving fault on the party claiming to rely on frustration."

Anson in Law of Contract,[118] said: "It was not necessary for the House of Lords to decide whether mere negligence would be sufficient, for it held that the burden of proving that the event which causes the frustration is due to the act or default of a party lies on the party alleging it to be so. Since the respondents failed to satisfy the court on this point, the contract was discharged." "The rule, however, is not altogether clear when such an act was inadvertent and merely negligent. Although there have been frequent statements to the effect that the frustrating event must occur without the default of either party, this point has never been expressly decided.

It was discussed by the House of Lords where Lord Russell, commenting on the kind or degree of fault which might

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[118] Anson, 26th edition, p. 460, *Law of Contract*.

debar a party from relying on a self-induced frustration, said:

> "The possible varieties are infinite, and can range from the criminality of the scuttler who opens the sea-cocks and sinks his ship, to the thoughtlessness of the prima donna who sits in a draught and loses her voice. I wish to guard against the supposition that every destruction of corpus for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the meaning of the phrase."

Chitty On Contracts,[119] commenting on Constantine's case has observed: "The question of the onus of proof was settled by the House of Lords where it was laid down that the party relying on frustration need not prove affirmatively that the frustrating event was not caused by his own fault. If he proves events which prima facie would frustrate the contract, the onus of proving that the frustration was self-induced is on the other party who denies that the contract has been frustrated: the latter must prove some default by the former which caused the allegedly frustrating event."

3.10 SUMMING UP OF JUDICIAL DECISIONS:

In *Paradine v. Jane*[120] (1947) the reason of the rule was that the party was not excused from the obligation, notwithstanding an accident by inevitable necessity because the might have provided against it by his contract. In that

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119 Chitty, 25th edition, para 1446, *Law of Contracts.*
120 *Paradine v. Jane,* (1647) Aleyn 26.

case in spite of actual impossibility, the party was not excused from performance.

In 1863 in *Taylor v. Caldwell*,[121] it was observed that the doctrine of sanctity of contract applied only to a promise, which was positive and absolute, and not subject to any condition express or implied. Applying this doctrine, it was held that in this case from the nature of the contract is was apparent that the parties contracted on the basis of the continued existence of the subject-matter of the contract, i.e., the music hall, etc. Though the contract was silent on the point, it was implied and therefore it was held that the contract was frustrated because of the destruction of the music hall, a case of physical impossibility in which the plea of frustration was upheld.

Bailey's case (1869)[122] propounded the proposition that though the contract may be absolute yet because of the supervening circumstance of compulsory acquisition under a statute an event un-contemplated by the parties, the contract would be frustrated.

The doctrine of frustration consequent on physical impossibility was enlarged to include frustration of the commercial adventure in the case of *Jackson v. Union Marine Insurance Co. Ltd*. (1874).[123] Time taken to repair the ship in this case was so long as to put an end, in a commercial sense, to the contract between the parties, as the court held that the voyage undertaken after the ship was repaired would have been a different voyage, a different

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121 *Taylor v. Caldwell,* (1863) 3 B&S 826.
122 *Baily v. De Crespigny,* (1869) LR 4 QB 180.
123 *Jackson v. Union Marine Insurance Co. Ltd*., (1874) LR 10 CP 123.

adventure altogether. Thus, the development was on the line that the contract may be frustrated even though it has not become illegal or literally impossible to perform if the supervening events destroyed some basic, though tacit assumption on which the parties have contracted.

Dahl's case (1881)[124] propounded the implied term theory.

This principle propounded in Jackson's case was emphasized in *Krell v. Henry*,[125] and the coronation cases. This case of Krell v. Henry is contrasted with the other case, Herne Bay Steamship Co. v. Hutton, which was decided little earlier wherein there was somewhat similar contract involved. The contract in Herne Bay case was for the purpose of viewing the naval review and for a day's cruise round the fleet. Though the review was cancelled, the fleet remained. Plea of frustration was refused because it was considered that the holding of the review was not the sole adventure contemplated, but the cruise round the fleet was an equally basic object of the contract, which still remained capable of attainment. Therefore, a distinction is to be drawn between object and motive. In the former case there would be frustration but not in the latter case. *Krell v. Henry* was considered to be a case of object while Herneby's case that of motive.

SS Tamplin's case (1916)[126] is one of the crop of cases which were the result of 1914 – 1918 War. This case held that time charter party for 5 years was not frustrated by requisition of the ship during the war as many more months remained for fulfilling the charter after the requisition

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124 Dahl v. Nelson, Donkin and Co., (1881) 6 AC 38.
125 *Krell v. Henry, (1903) 2 KB 740.*
126 Tamplin SS Co. v. Anglo- Mexican & Co., (1916) 2 AC 397.

ended. But this opinion was rejected in the Bank line case (1919) in which case the charter was one year. Comparing the two cases it seems that the main thing to be considered is the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charter party.

Russokoe's case (1922)[127] focused attention on the contract being frustrated in the event of circumstances ceasing to exist during the operation of the contract, which at the time of entering into were contemplated by the parties to be of the essence of the contract.

In *Larrinaga's case (1923)*[128] plea of frustration was rejected in the case of a contract of carriage of six cargos entered into in 1913 pertaining to the period of operation of the contract between March 1918 pertaining to the period of operation of the contract between March 1918 and November 1920. It was pleaded that after the end of the 1st World War the contract was frustrated because of the altered shipping conditions. The House of Lords rejecting this plea observed that a contract of this kind not to be performed for many years was essentially speculative. Each party deliberately took the risk that conditions might alter. Consequently alteration of conditions did not qualify for a plea of frustration.

Hirji Mulji's case (1926)[129] is an authority for the proposition that frustration brings the contract to an end automatically and could not be waived. The effect of frustration is to

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127 *Russokoe & Co. v. John Stirk and Sons Ltd*., (1922) 10 LR 214.

128 *Larrinaga v. Societe Franco – Americaine,* (1923) 39 TLR 316 : 92 LJ KB 455.

129 *Hirji Mulji v. Cheong Yue SS Co. Ltd*., (1926) AC 497.

release both parties from any further performance of the contract while leaving in tact any legal rights already accrued or money already paid before the frustration event occurred. In short all obligations falling due for performance after that time are discharged. All those already due remain undisturbed.

Maritime National Fish case (1935)[130] re-emphasized that frustration of the contemplated adventure follows automatically when the relevant event happens and does not depend on the volition or election of either party.

In *Tatem's case (1939),* the plea of frustration was upheld in a case where during the Spanish Civil War plaintiffs chartered to the defendant a steamship for 30 days from July 1, 1937. On July 14, the ship was seized by the Nationalists and detained till September 11. In answer to the plaintiffs claim for hire the defendant pleaded frustration of the contract. The Court observed that if the foundation of the contract goes either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, the performance of the contract is to be regarded as frustrated.

In *Joseph Constantine case (1942),*[131] the appellants chartered to the respondents their steamship to proceed to Australia and load the cargo there. Before this could be done a violent explosion occurred in the boiler, which resulted in delay. The cause of the explosion could not be ascertained. It was held by the House of Lords that since

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130 *Maritime National Fish Ltd. V. Ocean Traders Ltd.,* (1935) AC 524.

131 *Joseph Constantine SS Line Ltd., v. Imperial Smelting Corporation,* (1942) AC 154.

the charterers were unable to prove that the explosion was caused by the fault of the owners, the defence of frustration succeeded. It may be stated that a self-induced frustration cannot be relied on by a party as a justification for non-performance of the contractual obligations.

It may be noticed that the English Parliament passed Law Reform (Frustrated Contracts) Act, 1943 which regulated the rights and obligations of the parties to the contract consequent on frustration.

Sir Lindsay Parkinson's case (1949)[132] is an authority for the proposition that if some catastrophic event occurs for which neither party is responsible and if the result of that event is to destroy the very basis of the contract then the contract is frustrated. Frustration would be the result despite the clause in the contract contemplating delays not to result in dissolution of the contract. Such a clause has been interpreted to mean normal moderate delay, not a delay which would result in making the performance of the contract radically different from the originally contemplated one.

British Movietonews case (1951)[133] is a landmark case. Lord Denning (Court of Appeal) held that even if the contract was absolute in terms it was not absolute in intent and, therefore, it will not be held absolute in effect. In that case, the plaintiffs were film distributors and the defendants were owners of a chain of cinemas. In 1941 the plaintiffs contracted to supply the defendants with films. The

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132 *Sir Lindsay Parkinson Ltd. V. Commissioner of Works.,* (1949) 2 KB 632.

133 *British Movietonews Ltd. V. London & District Cinemas Ltd.,* (1951) 1 KB 190.

contract permitted either party to terminate by giving four weeks notice. In 1943, a Government order restricted the supply of films and the parties entered into supplementary agreement stipulating that the principal agreement shall remain in full force and effect until such time as the order is cancelled. On the termination of the war in 1945 the order was not cancelled but it was continued in force for quite different reasons. In 1948 the defendants gave four weeks' notice in accordance with the original agreement to terminate the contract. The plaintiffs refused to accept the notice as valid and sued for breach of contract on the plea that the order was still in force. The Court of Appeal went outside the literal words of the contract and read it in the light of the parties presumed intention that the supplementary agreement was to endure only as long as wartime conditions persisted. The continuance of the order beyond the period was un-contemplated by the parties and the defendants were relieved from their liability. This view was promptly repudiated on appeal by the House of Lords re-affirming the proposition that no Court has an absolving power and that it was not possible to relieve the parties from their contractual obligations merely because it was just and reasonable to do so. This gave a blow to the just and reasonable theory of frustration of a contract.

In *Davis Contractor's case (1956)*[134] plea of frustration was rejected on the ground that the possibility of enough labour and material not being available, must have been present before the eyes of the contracting parties when they entered into the contract but still as they did not make any specific stipulation about the same, this cannot be an implied term of the contract that the parties contracted on

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134 *Davis Contractors Ltd. V. Fareham,* (1956) AC 696.

the tacit assumption of continued existence of availability of labour and material in sufficient quantities at appropriate time as the basis of the contract.

Actual performance being possible but the mode of performance becoming more onerous consequent on supervening events has not been considered to be a justifying cause for holding that the contract is frustrated nor in such a case an implied term can be supplied by law that the mode of performance that was available at the time of the entering into the contract must be taken to be the basis of the contract so that the supervening event having adverse effect on that mode qualified for frustration. This was the line of thinking in the *Suez Canal cases*[135] when the Suez Canal was closed in 1956 and again in 1957. [Tsakiroglou case (1962), Eugenia (1964)].

Tsakiroglou case (1962)[136] emphasizes altered nature of the contractual obligation as a pre-requisite for the attraction of the doctrine of frustration. What is meant by the altered nature of the obligation is considered therein. Change in the manner or method of performance by itself would not qualify for frustration. The ultimate question for consideration is whether the new method of performance is fundamentally and radically different so as to make the contract a different contract from the contract entered into.

Hong Kong Fir Shipping case (1962) took notice of the historical growth of the Doctrine of Frustration and also of the Law Reform (Frustrated Contracts) Act, 1943 and restated the rule that where the event occurs as a result of

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135 *Hong Kong Fir Shipping Co. Ltd. V. Kawasaki Kisen Kaisha Ltd.,* (1962) 2 QB 26.

136 *Tsakiroglou & Co. v. Noblee Thorl GMBH.,* (1962) AC 93.

the default of neither party which event results in impossibility of performance each is relieved of the further performance of his own undertaking and their right in respect of undertakings previously performed would be regulated by the Law Reforms (Frustrated Contracts) Act, 1943.

The Eugenia case (1954)[137] has been referred to ante while discussing Suez Canal cases in which it was held that the owner of the ship cannot claim that the charter party has been frustrated by the closure of the Canal for this did not bring about the fundamentally different situation such as to frustrate the venture. The alternative route around the Cape was not found different but merely longer and more expensive which does not qualify for frustration. It may be noticed that because of this legal position later charter parties contained a Suez Canal clause, which was to apply to a future closing the canal.

Staffordshire Area Health Authority case (1978)[138] is an authority for the proposition that the contract can be frustrated by inflation as it was outside the realm of the contemplation of the parties when they entered into the contract.

National Carriers case (1981)[139] and *'The Nema' (1981)*[140] reaffirm the Doctrine of Frustration and the principles laid down in the previous rulings summarized above.

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137 *Ocean Tramp Tankers Corporation v. V/O Sovfracht (The Eugenia),* (1964) 2 QB 226.

138 *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co. Ltd.,* (1978) 2 ALL ER 769 : (1978) 1 WLR. 1387.

139 *National Carriers Ltd. V. Panalpina (Northern) Ltd.,* (1981) 1 All ER 161.

140 *The Nema,* (1981) 2 All ER 2030.

BP Exploration case (1982)[141] is a case of frustration due to expropriation by a governmental action – in this case Libyan Government. While holding that the contract was frustrated, the question for decision was whether the rights and obligations of the parties were to be governed by Law Reform (Frustrated Contracts) Act, 1943 or to be modified in view of the contractual stipulations. This case contains a full exposition and analysis of the Act while construing it and is a valuable guide on the point. While reaffirming the proposition that 1943 Act would be modified by contractual stipulations, such stipulations have to be reasonably construed. On the facts of that case, the House of Lords held that section 2(3) of the 1943 Act did not apply because of the contractual stipulations. *The Evia case (1982)* is an illustration of the crop up cases, which came up as a consequence of Iran Iraq War, which broke out on 22nd September 1980. It was reaffirmed in this case that Doctrine of Frustration would have to be modified by reason of the contractual stipulations. Care must be taken to consider that the clauses in the contract exhaust the operation of the Doctrine of Frustration or partially deal with it. The ultimate conclusion would depend upon the construction of these clauses. This ruling applies to the principles established by the House of Lords in National Carriers case (1981) and *'The Nema'* case (1981).

Kodros case (1982)[142] is an instance of contractual frustration clause and is more concerned with the interpretation of that clause rather than general law of frustration, except its importance for determination of the

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141 *BP Exploration v. Hunt*, (1982) 1 All ER 925.

142 *Kodros Shipping Corporation v. Empresa Cubana de Fletes, (The Evia),* (1982) 3 All ER 350.

date of frustration in the case of a prospective frustration contemplated by the parties and provided for partly or wholly in the contract itself. If supervening event is such that it is quite clear that it is highly probable that there will be serious interference with performance, law does not permit such a situation where contractual rights and obligations are left indefinitely in suspense. The event may be such that a reasonable view of its effect on the contract can be taken as soon as it occurs; or it may be such that it may cause slight or serious interference depending on the length of its continuation, e.g., strike or war. In such contingency, it is necessary to wait on events, particularly to determine the day of frustration. As regards the duration, the forecast may be optimistic or pessimistic and future events may belie the forecast but the court will be justified in holding that the contract is frustrated on the basis of sensible commercial prognosis of the event.

3.11 CONCLUSION:

It is an interesting and fascinating study to trace the development of the doctrine of frustration of contract as an inroad into the old doctrine of absolute liability of the contract. There was a time when contract was considered as a piece of private legislation, sacred, sacrosanct, to which man was required to do obeisance from afar but not to go near the *sanctum sanctorum*. Parties stood in awe of the sacred pact as it were placed on par with Holy Scripture so sanctified as no to be defiled by human touch. Even the judges shied from touching the contract by supplying an obvious gap or implying a term, by pleading helplessness in the matter. It was repeatedly averred by the courts that it was for the parties to make the contract and for the courts

to enforce it. Like all human institutions, nothing is static but the change is so imperceptible that it is difficult to pinpoint any point of time when the old doctrine was discarded and the new doctrine evolved. When the courts pleaded impotence and proceeded to enforce the contract as worded, despite the fact that the enforcement perpetrated injustice, there was certain amount of resentment in the minds not only of the lawyers but the judges themselves apart from the litigating public and a search was made for a solution. It was unthinkable to take it lying down that the courts were instruments of doing injustice by enforcing such an atrocious covenant. It was very strongly felt that the court should do its duty as an instrument of doing justice and find a way out how to go about it. English ingenuity did not fail to meet the situation and a doctrine of implied term was resorted to by courts. Once the courts assumed the role of interfering with the contract in order to do justice between the parties by introducing implied terms as fair and reasonable, the old and impregnable fortification of absolute liability crumbled.

CHAPTER - IV

DEVELOPMENT OF DOCTRINE OF FRUSTRATION OF CONTRACT

4.1 INTRODUCTION:

Law Reform (Frustrated Contract) Act, 1943 :

The situation created by Common Law regarding effect of frustration called for some remedial action, which eventually had to be done by legislation in the shape of Law Reform (Frustrated Contracts) Act, 1943. In *Hirji Mulji's case*,[1] it was observed that the effect of frustration at common law is to release both parties from any further performance while leaving intact any legal rights already accrued. That was the position affirmed by the Courts in earlier rulings –

(1) *Appleby v. Myers*[2]

(2) *Chandler v. Webster*[3] – (1904) 1 KB 493.

In *Appleby v. Myers*, the plaintiffs undertook to erect some machinery upon the premises of the defendants, the contract specifically stipulating that plaintiff was to be paid for on completion of the work. While the work was in progress and before completion the premises with the machinery partly erected were entirely destroyed by fire. The court while holding that the contract was frustrated held that the plaintiffs could recover nothing for the part work done as the contractual stipulation was that payment was to be made only on completion.

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1 *Hirji Mulji v. Cheong Yue SS Co. Ltd.*, (1926) AC 497.
2 *Appleby v. Myers*, (1867) LR 2 CP 651.
3 *Chandler v. Webster,* (1904) 1 KB 493.

In *Chandler v. Webster* the plaintiff agreed to hire a room in Pall Mall to watch the Coronation Procession. The agreed price was £141 payable immediately. The plaintiff paid £100 to be defendants but before he paid the balance of £41 the procession was cancelled. The plaintiff claimed the restitution of the £100. The Court held that not only he could not recover the £100 but also he was liable to pay the balance of £41 as the obligation to pay under the contract had fallen due before the occurrence of the frustrating event. The decision was sought to be justified on the strength of the proposition that the effect of frustration is to release the party from further performance while leaving in tact any legal rights already accrued. The harshness of these decisions naturally provoked considerable criticism and called for a remedy. Chandler's case was subsequently over-ruled by House of Lords in *Fibrosa Spolka Akcyina v. Fairbairn Lawson Combe Barbour Ltd.*[4] The facts of the case were: "The respondents contracted with the appellants, a Polish company, to manufacture certain machinery and deliver it to Gdynia. Part of the price was to be paid in advance, and the appellants accordingly paid £ 1,000. The contract was frustrated by the occupation of Gdynia by hostile German forces in September, 1939. The appellants thereupon requested the return of the £ 1,000, which they had paid. One these facts applying the ruling in *Chandler v. Webster's* case[5], this money would have been irrecoverable but the House of Lords overruled that decision and held that the appellants could recover. The decision was sought to be justified on the ground that an action for the recovery of the sum paid was not an action on the contract but an action in restitution to recover money paid

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4 *Fibrosa Spolka Akcyina v. Fairbairn Lawson Combe Barbour Ltd.*, (1943) AC 32.

5 *Chandler v. Webster,* (1904) 1 KB 493.

on a consideration, which had wholly failed. This decision though welcomed as a departure from the hardship of the rule of Common Law set out above, did not have the effect of rendering the situation totally satisfactory, because it may be that the party who had to return the pre-payment might have incurred expenses or as a result of the frustration of the contract he may be left high and dry with the goods (in case of sale of goods) valueless to him. Moreover, if the party claiming recovery, of the pre-payment had received part performance of the contract, there could be no total failure of consideration and the rule in Fibrosa case would not apply. It was to remedy this situation that the Law Reform (Frustrated Contracts) Act, 1943 was passed on 5th August, 1943.

4.2 ADJUSTMENT OF RIGHTS AND LIABILITIES OF PARTIES TO FRUSTRATED CONTRACTS:

(1) Where a contract governed by English law has become impossible of performance or been otherwise frustrated and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section 2 of this Act, have effect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as “the time of discharge”) shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable: Provided that if the party to whom sums were

so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing sub-section applies) before the time of discharge, there shall be recoverable the value of the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,

(a) the amount of any expense incurred before the time of discharge by the benefited party in, for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing sub-section, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

(4) In estimating, for the purpose of the foregoing provision of this section, the amount of any expenses

incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sums as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.

(5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to the party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

(6) Where any person has assumed obligation under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstance of the case it considers it just to do so, treat for the purposes of sub-section (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

4.3 APPLICATION OF THE ACT:

(1) This Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge is on or after the first day of July, nineteen hundred and forty-three, but not to

contracts as respects which the time of discharge is before the said date.

(2) This Act shall apply to contracts to which the Crown is a party in like manner as to contracts between subjects.

(3) Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision.

(4) Where it appears to the court that a party of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract.

(5) This Act shall not apply:

(a) to any charter-party, except a time charter-party or a charter-party by way of demise; or to any contract (other than a charter-party) for the carriage of goods by sea; or

(b) to any contract of insurance, save as is provided by sub-section (5) of the foregoing section; or

(c) to any contract to which section 7 of the Sale of Goods Act, 1893 (which avoids contracts for the sale of specified goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery of specified goods, where the contract is frustrated by reason of the fact that the goods have perished.

4.4 INTRODUCTION OF THE ACT:

(1) This Act may be cited as the Law Reforms (Frustrated Contracts) Act, 1943.

(2) In this Act the expression “court” means, in relation to any matter, the court or arbitrator by or before whom the matter falls to be determined.

The Act neither covers all contracts nor all contingencies. While striving to suggest the solution of the problem regarding alleviation of the hardship of the Common Law it has also succeeded in focusing attention on the glaring gap

between the problem and the solution highlighting the area which is still uncovered and yet to be tackled.

Although the Act provides for some of the legal consequences of frustration, it is still necessary to turn to the Common Law in case of contracts and contingencies uncovered and the interpretation of the Act itself demands knowledge of the Common Law.

Section 1(2) goes beyond the decision in Fibrosa case as it permits the recovery of an advance payment even in the case of a partial failure of consideration. Under this sub-section advance payment is recoverable as money received to the plaintiffs use and not as moneys recoverable on a consideration, which has failed. The proviso to this section permits the recipient of the advance payment to apply for a sum in respect of his expenses incurred before the frustration. Subject to the pre-requisites that one advance payment was made by or due from the other party before the date of the frustrating event to the amount allowed for expenses must not exceed the amount of such advance payment.

Section 1(3) reverses the rule in *Appleby v. Myers case*,[6] that is, in the case of a frustration of a lump sum contract nothing is recoverable since the work has not been completed. Unlike sub-section 2 it is not confined to cases where advance payment has been made before the date of frustration but extends to all cases where a party by partial performance has conferred a valuable benefit on the other party.

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6 *Appleby v. Myers case*, (1867) LR 2 CP 651.

Section 1(3) has been considered in depth in the judgment of Robert Goff, J., in the case of *B.P. Exploration Co. (Libya) v. Hunt*,[7] discussed later in this book. Section 2(5) gives the list of contracts to which the Act does not apply. Amongst the list is any contract to which section 7 of the Sale of Goods Act, 1893 applies..... this sub-section is clumsily drafted and is difficult to understand. The problem is to discover what type of contract is covered by these words. It is not quite clear why an arbitrary distinction should have been made between different contracts for the sale of goods or why it was considered necessary to exclude any such contract from the operation of the Act. There seems to be no reason why the provision for the apportionment should not have embraced all contracts for the sale of goods. The only reason it seems, which can be given for not applying the Act to all contracts for the sale of goods possibly can be that in such contracts certainty is more important than justice. The rules on risk are meant to provide this required certainty and any judicial interference with them may result in disruption of that certainty but the logical extension of this reasoning would be that all contracts for sale of goods should have been excluded from the operation of the Act. Partial exclusion does not satisfy the requirements of either convenience or justice. The Act excludes where the goods are specific. What are specific goods may present a problem. As an illustration if a farmer sells a specified quantity of crop to be grown on a land and the crop is destroyed by some unforeseen events, which result in frustration. As the goods are not specific, he can set all his expenses of growing the crop against the advance payment made by the buyer but if the crop has been lifted and stored in the go-down and described as

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7 *B.P. Exploration Co. (Libya) v. Hunt, (1982)* 1 All ER 925.

such in the contract the goods may be stated to be specific and the Act would not apply. In such an event the farmer would have to return the whole of the advance payment made by the buyer. One may well ask, is this justice? Like all steps in the progress of development in different fields, the Act though not perfect in itself was a step in the right direction and like any other similar step while seeking to remedy a wrong, attention is focused on uncovered areas for further and future development.

4.5 LANDMARK DECISIONS OF ENGLISH COURTS:

Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd. (1944).[8]

In the case of *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd*., the facts of the case were: "A contract for the sale and purchase of timber contained an option for the appellants to purchase a timber-yard (which was meanwhile let to them) if the contract was terminated on notice given by either party. But the Control of Timber Order, 1939 further trading transactions under the contract became illegal, but in 1941 the appellants gave notice to terminate the contract, and also to exercise their option to purchase the timber-yard." On these facts, "the House of Lords held that the opinion to purchase was dependant on the trading agreement, that the 1939 Order had operated to frustrate the contract, and that, consequently, the option to purchase lapsed upon the frustration since it arose only if the contract was terminated by notice." Commenting in this case: Cheshire, Fifoot and Furmston's Law of Contract, 11th

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8 *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd*. (1944) AC 265.

edition at p. 557 has this to say – "Perhaps the most careful analysis of this theory has been made by Lord Wright, and the following two passages from his speech in a leading case illustrate his view that the doctrine of frustration has been invented by the courts in order to supplement the defects of the actual contract.[9]

In the first passage he said:

> "Where, as generally happens, and actually happened in the present case, one party claims that there had been frustration and the other party contests it, the court decides the issue and decides it ex post facto on the actual circumstances of the case. The data for decision are, on the one hand the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand, the events which have occurred. It is the court which has to decide what is the true position between the parties."

The second passage is as follows:

> "The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed and experienced minds'."

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9 Cheshire, Fifoot and Furmston, 11th edition, p. 557, *Law of Contract.*

Anson on the aforesaid aspect said that "Moreover, had (the possibility of the frustrating event actually) it occurred to them, it is unlikely that they would have agreed that the contract was to come to an end: "It is not possible, to my mind (said Lord Wright), to say that if they had thought of it, they would have said: 'Well, if that happens, all is over between us'. On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations."[10]

Sir Lindsay Parkinson Ltd. v. Commissioner of Works (1949).[11]

Chronologically, the next case is in 1949, *Sir Lindsay Parkinson & Co. Ltd. v. Commissioner of works*, in which Asquith, L.J., observed: "The question is whether the events alleged to frustrate the contract were 'fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply'." These observations have been quoted with approval subsequently in Davis Contractor's case discussed later in this book. The finding of frustration was handed down despite a clause in the contract that in the case of certain contingencies, the contract would only be suspended. Considering this, Asquith, L.J. observed: "A contract often provides that in the event of 'delay' through specified causes, the contract is not to be dissolved, but merely suspended, yet such a provision has been held not to apply where the delay was so abnormal, so pre-emptive, as to fall outside what the parties could possibly have contemplated in the suspension clause. In other words 'delay' though literally describing

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10 Anson, 26th edition, p. 457, *Law of Contract.*:

11 *Sir Lindsay Parkinson & Co. Ltd. v. Commissioner of works*, (1949) 2 KB 632, 665.

what has occurred, has been read as limited to normal, moderate delay, and as not extending to an interruption so differing in degree and magnitude from anything which could have been contemplated as to differ from it in kind."

British Movietonews Ltd. v. London and District Cinemas Ltd. (1951).[12]

The next case in chronological order which is a landmark case in the development of Law on the Frustration of Contract, is the case of *British Movietonews Ltd. v. London and District Cinemas Ltd*., in which the Court of Appeal, Lord Denning, who spoke for the Court, held that the Court could go outside the literal words of the contract and read it in the light to the parties presumed intention. It would be helpful to set out the facts of the case, which were – "The plaintiffs were film distributors and the defendants were owners of a chain of cinemas. In 1941 the plaintiffs contracted to supply the defendants with films, the contract permitting either party to terminate the contract by giving four weeks notice. In 1943, a government order restricted the supply of film, and, in order to safeguard their position, the parties entered into a supplementary agreement in which it was provided that 'the principal agreement shall remain in full force and effect until such time as the order is cancelled'. It might have been expected that, when the war came to an end in 1945, the order would have been abrogated immediately, but this was not the case and it was continued in force for quite different reasons than those of national safety. In 1948, the defendants gave four weeks notice, in accordance with the original agreement, to terminate the contract. The plaintiffs refused to accept this notice as valid, and sued for breach of contract, the order

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12 *British Movietonews Ltd. v. London and District Cinemas Ltd.,* (1951) I KB 190 (202) : (1952) AC 166.

still being in force." On these facts Lord Denning observed – "Even if the contract is absolute in its terms, nevertheless it is not absolute in intent, it will not be held absolute in effect. The day is gone when we can excuse an unforeseen injustice by saying to the sufferer." It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself. We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers. We realize that they have their limitations and make allowances accordingly." The Court held that the supplementary agreement was to endure only as long as wartime conditions persisted. The continuance of the order beyond that period was quite un-contemplated by the parties and the defendants should be relieved from liability. This view was promptly repudiated on appeal by the House of Lords.[13] Their Lordships reiterated the statement of Lord Loreburn that 'No court has an absolving power'. Viscount Simon pointed that it is not possible to release parties from the contractual obligations merely because it is just and reasonable to do so, for this might well be the case when the only effect of the subsequent event had been to render the contract financially more onerous than the parties had anticipated. A situation must arise to which it can be said that the contract no longer applies. In the House of Lords, however the orthodox principle of construction was restated. It was the duty of the Courts to ascertain the intention of the parties from the documents itself and not to re-write it in the light of what the parties might (or might not) have had in mind at the time they made a contract. The words of agreement were clear and unequivocal and the defendants were bound by them.

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[13] *British Movietonews Ltd. v. London and District Cinemas Ltd.,* (1951) I KB 190 (202) : 1952 AC 166

Davis Contractors Ltd. v. Fareham Urban District Council (1956).[14]

Legal connotations of the word 'frustration', its implications and its historical development have been considered in *Davis Contractors Ltd. v. Fareham Urban District Council*. The facts of the case were:

"Early in 1946 the respondents, in contemplation of a building scheme invited tenders by March 19, 1946. On March 18 the appellants sent in a signed tender on the appropriate form undertaking the erection of (inter alia) 78 houses at Gudgeheath Lane, Fareham, in the country of Southampton, at a price of £ 92,425 and within the limits specified. With it went a covering letter of the same date and there was nothing in the appendix except a clause limiting to some extent the contractor's right to vary the contract sum in respect of price variations of materials and goods. Negotiations followed and between March 18 and the date when the formal agreement was entered into the appellants in fact supplied the respondents with a detailed schedule of prices which was intended to constitute the list of materials and goods called for by appendix I, and was accepted. No further reference was apparently made to the letter of March 18.

The building contract was contained in a short agreement under seal dated July 9, 1946, and its main purpose was to identify several documents, which had come into existence during or for the purpose of the preceding negotiations.

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14 *Davis Contractors Ltd. v. Fareham Urban District Council*, 1956 AC 696.

By the general conditions the appellants agreed to build 78 houses at Gudgeheath Lane within a period of eight months, completing 40 houses in six months and 70 houses in seven months. There was a penalty clause of £ 5 a week of every house uncompleted after the contract period.

The work started on June 20, 1946, for various reasons, the chief of them, the lack of skilled labour, the work took not eight but 22 months. The appellants were in due course paid the contract price, which, together with stipulated increases and adjustment, amounted to £ 94,424. They contended, however, that owing to the long delay the contract price had ceased to be applicable, and that they were entitled to a payment on a *quantum meruit* basis.

The arbitrator set out the contentions of the appellants as follows:

> "(1) That the letter of March 18, 1946, become a term and condition of the contract. (2) That in any event the contract was entered into on the basis that adequate supplies of labour and materials would be available at the times required. (3) That because adequate supplies of labour and materials were not available the footing of the contract was removed and the claimants were entitled to be paid on the basis of a *quantum meruit*."

The arbitrator stated the question of law, which he was requested to state for the decision of the court:

> "(a) Whether the stipulation as to availability of labour and materials made in the claimants' letter of March 18, 1946, became a term of the contract.
>
> (b) Whether the claimants are entitled to be paid any sum in excess of £ 94,424 17s. 0d. already paid to them."

Upon the matter coming before the court, Lord Goddar, C.J., was of the opinion that the letter of March 18, 1946, was incorporated in the contract, and upon that basis was further of opinion that there was an implied promise by the respondents to pay a further reasonable sum if the conditions of the letter were not satisfied. (On appeal, the Court of Appeal referred the case back to the arbitrator for further findings of fact.)

The arbitrator in his supplemental award dated October 22, 1954, stated that contentions of the appellants, which repeated their previous contentions. The contentions of the respondents included the following:

> "(4) That in any event the footing on which the contract was agreed was not so changed that the contract could be declared or treated as void or the claimants be entitled to payment on quantum meruit.
>
> (5) That any claim on a quantum meruit basis was precluded by reason of the conduct of the parties after a claim for additional payment was first intimated by the claimants. That the respondents so far from allowing the claimants to continue to work on a different basis consistently maintained that the contract was still applicable."

The arbitrator then stated the question of law for the opinion of the Court:

> "(1) Whether this stipulation as to the availability of labour and materials made in the claimants' letter of March 18, 1946 became a terms of the contract.
>
> (2) Whether the claimants are entitled to be paid any sum in excess of £ 94,424 17s. 9d. already paid to them, namely, on quantum meruit, by reason of (a) the footing upon which the contract was made having been so changed in the course of its execution that is provisions no longer applied, or (b) an implied term in the contract that it ceases to bind in the circumstances as found. (3) Whether, if the claimants became entitled to be paid any sum in excess of that already paid to them by the respondents, such a claim was barred by the conduct of the parties……."

That arbitrator found that both parties entered into the contract on the basis that adequate supplies of labour and material would be available at the times required, that such supplies were not so available, and that, as the duration of the work was unavoidably extended from a period of eight months to one of 22 months, the footing of the contract was removed.

The Court of Appeal held that the letter of March 18, 1946 was not incorporated in the contract and that the contract was not frustrated. Davis Contractors Ltd. appealed to the House of Lords. The appeal was dismissed.

The judgment recorded by Lord Reid is illuminating. Some passages there from are reproduced below for ready reference : Lord Reid : I think it is necessary to consider what is the true basis of the law of frustration.

Lord Porter said in *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*[15] : "Whether this result follows from a true construction of the contract or whether it is necessary to imply a term or whether again it is more accurate to say that the result follows because the basis of the contract is overthrown, it is not necessary to decide." These are the three grounds of frustration, which have been suggested from time to time, and I think that it may make a difference in two respects, which is chosen. Construction of a contract and the implication of a term are questions of law, whereas the question whether the basis of a contract is overthrown, if not dependent on the construction of the contract, might seem to be largely a matter for the judgment of a skilled man comparing what was contemplated with what has happened. And if the question is truly one of construction, I find it difficult to see why he should not apply the ordinary rules regarding the admissibility of extrinsic evidence whereas, if it is only a matter of comparing the contemplated with the actual position, evidence might be admissible on a wider basis.

Further, I am not satisfied that the result in necessarily the same whether frustration is regarded as depending on the addition to the contract of an implied term or an depending on the construction of the contract as it stands.

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15 *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*, (1944) AC 265 : (1944) 1 All ER 678.

Frustration has often been said to depend on adding a term to be contract by implication: for example, Lord Loreburn in *F.A. Tamplin Steamshihp Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*,[16] after quoting language of Lord Blackburn said: "That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'if that happens of course, it is all over between us'? What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency ought a Court to say it is obvious they would have treated the thing as at an end`?"

I find great difficulty in accepting this as the correct approach because it seems to me hard to account for certain decisions of this House in this way. I cannot think that a reasonable man in the position of the seaman in *Horlock v. Beal*[17] would readily have agreed that the wages payable to his wife should stop if his ship was caught in Germany at the outbreak of war, and I doubt whether the charterers in the Bank Line case could have been said to be unreasonable if they refused to agree to a term that the contract was to come to an end in the circumstances which occurred. These are not the only cases where I think it would be difficult to say that a reasonable man in the position of the party who opposes unsuccessfully a finding of frustration would certainly have agreed to an implied term bringing it about.

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16 *F.A. Tamplin Steamshihp Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.,* (1916) 2 AC 397.

17 *Horlock v. Beal,* (1916) 1 AC 486.

I may be allowed to note an example of the artificiality of the theory of an implied term given by Lord Sands in *James Scott & Sons Ltd. v. Del Sel*[18] : "A tiger has escaped from a traveling menagerie. The milk girl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but even so it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract."

I think that there is much force in Lord Wright's criticism in *Denny, Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd.*[19]: "The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible to my mind, to say that, if they had thought of it, they would have said: "Well if that happens, all is over between us." On the contrary they would almost certainly on the one side or the other have sought to introduce reservations or qualification or compensations."

It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms, which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made. There is much authority for this view. In *British Movietonews Ltd. v. London and District Cinemas Ltd.*[20] Viscount Simon said: "If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they

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18 *James Scott & Sons Ltd. v. Del Sel*, 1922 AC 592.

19 *Denny, Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd.,* 1944 AC 265 : (1944) 1 All ER 678.

20 *British Movietonews Ltd. v. London and District Cinemas Ltd.*, (1951) I KB 190 (202 : 1952 Ac 166.

never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation." In *Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Words Asquith*,[21] L.J., said: "In each case a delay or interruption was fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply, although there was nothing in the express language of either contract to limit its operations in this way." I need not multiply citations, but I might note a reference by Lord Cairns so long ago as 1876 to "additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon." On this view there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."

I do not think that there has been a better expression of that general idea than the one offered by Lord Loreburn in *F.A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*[22] It is shorter to quote than to try to paraphrase it: "……..a court can and ought to examine the contract and circumstances in which it was

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21 *Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Words Asquith,* (1949) 2 KB 632, 665.

22 *F.A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.,* (1916) 2 AC 397.

made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it is not expressed in the contract. No court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted." So express, the principle of frustration, the origin of which seems to lie in the development of commercial law, is seen to be branch of a wider principle, which forms part of the English law of contract as a whole. But, in my opinion, full weight ought to be given to the requirement that the parties "must have made" their bargain on the particular footing. Frustration is not to be lightly invoked as the dissolvent of a contract.

Lord Loreburn ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to t will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which ex hypothesis they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticized as obscuring the true action of the Court which consists in applying an objective rule of the law of contract to the contractual obligation that the parties have imposed upon themselves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed (see *British Movietonews Ltd. v. London and District*

Cinemas Ltd.[23], per Viscount Simon). But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must be given "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances." The legal effect of frustration "does not depend on their intention or their opinion, or even knowledge, as to the event. On the contrary, it seems that when the event occurs "the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically

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[23] *British Movietonews Ltd. v. London and District Cinemas Ltd*., (1951) I KB 190 (202 : 1952 Ac 166.

different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

There is, however, no uncertainty as to the materials upon which the Court must proceed. "The data for decision are, on the one hand, the terms and conditions of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. In the nature of things there is often no room for any elaborate inquiry. The Court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or "inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the things undertaken would, if performed, be a different thing from that contracted for."

I am bound to say that, if this is the law, the appellants' case seems to me a long way from a case of frustration.

VISCOUNT SIMONDS, LORD MORTON OF HENRYTON AND LORD SOMERVELL OF HARROW also delivered judgment dismissing the appeal.

Davis Contractors case is a landmark and a very important one in the development of law of frustration. The judgment, though negative in its result as having rejected the plea of frustration, is valuable in as much as while clearly and concisely stating the test by reference to which supervening events have to be considered as qualifying for frustration, it

sounds a warning that frustration is not to be lightly invoked. It is not every involuntary supervening event adversely affecting the performance of the contract competing for acceptance as frustration can be judicially approved for conferment of that qualification. In every contract there is an element of risk involved, as a contract, in ultimate analysis, is an arrangement for allocation of risk between the parties. Having agreed to that arrangement, the contract is sacred and sacrosanct and binding on the parties. No party can be permitted to wriggle out of this by pleading supervening circumstances, which were foreseeable and could be provided for.

In every building contract, it is assumed by the parties that the contract can only be performed if labour and material is available in adequate quantities at the required time. But the question is whether this is a term of the contract? Mere mention of this fact in the covering letter does not make it an express term of the contract as held in this ruling. Further, this ruling is an authority for the proposition that this also would not be an implied term of the contract. Significantly, there has been some difference in judicial opinions on this point as the High Court in U.K. held it to be a term of the contract while the Appellate Court held it otherwise, with which the House of Lords concurred. The reason of the rule seems to be, in the words of the House of Lords, “the possibility of enough labour and materials not being available was before of the eyes of the parties and could have been subject of special contractual stipulation. It was not made so.”

The covering letter specifically stated, “our tender is subject adequate supplies of material and labour being available as and when required to carry out the work within the time

specified". But yet this part of the covering letter was not held to be incorporated in the contract, despite the fact that Appendix I did make a mention of this covering letter dated 18-3-46. As the mention was limited to the price variation of materials and wages of labour as Appendix I only referred to these two topics, its scope was restricted to these two items. Significantly, though the High Court, Lord Goddar, C.J., was of the opinion that the entire letter of 18-3-46 was incorporated, the Court of Appeal restricted the scope to the subject matter of Appendix I with which House of Lords agreed. This illustrates the importance of the interpretation of contract. If the opinion of Lord Goddard that the entire letter of 18-3-46 was incorporated in the contract had held the filed, this statement about the availability of adequate supplies of material and labour at the time required would have formed the basis of the contract and its non-availability at the required time and consequent delay in execution of the contract from 8 months stipulated period to 22 months of the actual execution perhaps with the far-reaching consequences of the claim of the contractor for being paid at *quantum meruit* basis accepted.

The builder, having taken the risk of non-availability of labour and material in adequate quantities at the required time, cannot complain if he is unable to get labour and material in adequate quantities at the proper time which results in delay in completion and consequent increase in the cost due to inflation. Inflation, in modern times, is a fact of life and accepted as a recurrent, economic phenomenon. It is for prudent businessmen to provide a cushion for it in the price quoted in the contract. One cannot help having a feeling that every prudent builder does make an allowance for the inflationary element in his quoted

price and also keeps a margin for delay in completion due to various causes, including scarcity of labour and material in adequate quantities at the required time. If frustration were permitted on such a plea, it may become possible to plead frustration in almost every contract. Frustration is not to be lightly invoked as has been observed repeatedly by judicial authorities in a catena of cases, e.g., Lord Radcliff in Davis Contractors' case.

This ruling emphasizes that the effect of the doctrine of frustration is the termination of the contract by operation of law on the emergence of a fundamentally different situation. To use the language of Asquith, L.J., in *Sir Lindsays Parkinson and Co. Ltd. v. Commissioner of Works*[24]: The question is to be decided by a reference to whether the change was "fundamental enough to transmute the job the contractor had undertaken into a job of a different kind which the contract did not contemplate and to which it could not apply". In certain given situations, the change in the basis of the contract and the new situation is clearly demarcated and can easily be ascertained. In certain other situations, the change is gradual and imperceptible and not that easy of ascertainment. The question in such a situation arises when the frustration occurred. Incidentally, in the present case the point of time when the frustration occurred was not considered to be of importance because it was assumed that whatever the point of time when it did occur, the contractor would be paid for the whole of the work on quantum meruit basis. That is why it has been observed by the House of Lords (Lord Reid): "I did not pursue this matter because the respondents have admitted that if there was frustration at any time, the appellants are entitled to

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[24] *Sir Lindsays Parkinson and Co. Ltd. v. Commissioner of Works,* (1949) 2 KB 632.

the sum awarded." However, this point assumes importance because of the present position of law of apportionment between the parties consequent on frustration of the contract as embodied in Law Reforms (Frustrated Contracts) Act, 1943 of U.K. Apart from that, the real knotty problem is what events would qualify for frustration. Non-availability of labour and material in adequate quantities at the required time is an ordinary feature of a building contract and every prudent contractor is expected to be ready for such a contingency. This, no doubt, results in delay and increases the cost. But the question arises; does it make the contract radically different so as to attract the doctrine of frustration? Merely because the job may become more onerous would not, by itself, be sufficient to sustain a plea of frustration. In the words of House of Lords (Lord Reid): "In a contract, of this kind the contractor undertakes to do the work for a definite sum and he takes the risk of the cost being greater or less than he expected. If delays occur through no one's fault that may be in the contemplation of the contract, and there may be provision for extra time being given: to that extent the other party takes the risk of delay. But he does not take the risk of the cost being increased by such delay. It may be that delay could be of a character so different from anything contemplated that the contract was at an end, but in this case, in my opinion, the most that could be said is that the delay was greater in degree than was to be expected. It was not caused by any new and unforeseeable factor or event: the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract."

The factor of delay is only one of the causes of frustration. The categories of cases, which could qualify for frustration,

are not closed. An anthology of such cases would only be illustrative and cannot be exhaustive. The test whether a particular case qualifies for frustration or not, has been laid down by Lord Loreburn which has been quoted with approval by House of Lords (Lord Radcliffe in this case).

There was a tendency to ascribe frustration to an implied term of the contract because of the judicial weakness of ascribing every consequence or the contract to a term of the contract, whether express or implied, so as to bring it within the ambit of the theory of consensus ad idem and to feed to the doctrine of helplessness of the court to make or modify the contract and restrict its power to interpreting and enforcing the contract as made by the parties. But, subsequently, this attitude was discarded and the Courts took upon themselves the function of doing what was considered to be just and reasonable under the circumstances.

The problem crystallizes itself into as to what was the basis of the contract and what is the new supervening situation, which makes it radically different? How is the court to address itself to this task? This is what Lord Radcliffe has to say on the point: “There is, however, no uncertainty as to the materials upon which the court must proceed. “The data for decision are, on the one hand, the terms and conditions of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred.” In the nature of things there is often no room for any elaborate inquiry. The Court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship

or inconvenience or material loss itself, which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that thing undertaken would, if performed be a different thing from that contracted for." The expressions "radically different" and "significance of the obligation" have been judicially considered and critically analysed in the catena of cases collectively called Suez Canal Closure Cases.

Tsakiroglou & Co. v. Noblee Thorl GMBH[25]

The consequences of the closure of the Suez Canal in 1956 on contracts were litigated in two English cases in which the plea of frustration was upheld by the original Court but they were over-ruled subsequently. The Suez Canal was closed again in 1967 and the plea of frustration was again rejected.

The popular reaction to the closure of the Suez Canal was that this was an event unforeseen and unforeseeable when the contract was entered into. Nobody could predict that Nasser Government in Egypt would take such a drastic action as to close the Suez Canal and thus compel the ships to make the voyage via Cape of Good Hope. This popular reaction was reflected in the initial judicial decisions of the original court but when the matter was considered by the House of Lords, they over-ruled those decisions and, came to the conclusion that such contracts were not frustrated.

Closure of the Suez Canal and taking the ship on its voyage via Cape of Good Hope entailed that the voyage, instead of

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25 *Tsakiroglou & Co. v. Noblee Thorl GMBH*, 1962 AC 93.

4386 miles and taking three weeks, was 11,137 miles and took seven weeks and the freight per ton, instead of £ 7.10 increased to £ 15 per ton. One would have thought this involuntary supervening circumstance had consequences of such dimensions that their impact on the significance of the obligation would make the contract radically different and qualify for frustration, but it was not to be. It would be helpful to consider the case of Tsakiroglou. The judgment in this case is again a negative judgment but its value lies in its incisive analysis of the facts by reference to the tests for qualifying for frustration. We may say that in this context hard cases make good law. The contract in the case of Tsakiroglou's case was entered into on 4th October 1956 and the shipment was to be made during November – December 1956 but as the Canal was blocked on 2nd November, 1956, and remained blocked till April 1957, it could not be done via the Suez but it was feasible to make the voyage via Cape of Good Hope. It was argued that it was an implied term of the contract that shipment was to be via the Suez, though nothing was expressly mentioned in the contract. The ordinary rule is that a shipper must ship by the scheduled and customary route. If there is no such route, then by a practicable and reasonable route but the question arises at what point of time this has to be considered at the date of entering into the contract or at the time of performance? To this query, the answer has been given in Tsakiroglou's case in the following words: "There appears to be no decided case about this and, perhaps, that is not surprising because the point cannot often arise. Apart from the opinion of MacNair, J., in *Carapanayoti & Co. Ltd. v. E.T. Green Ltd.*[26], and the Court of Appeal in this case, which are against the appellants, there are a few

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[26] *Carapanayoti & Co. Ltd. v. E.T. Green Ltd.*, (1959) 1 QB 131 : (1958) 3 All ER 115.

expressions of opinion of this matter, but I shall not examine them as the precise point may not have been in the minds of their authors, and I am doing no injustice to the appellants because on the whole, these opinions favour the respondent's contention. Regarding the question as an open one, I would ask, which is the more reasonable interpretation of the rule?

If the appellants are right, the question whether the contract is ended does not depend on the extent to which the parties or their rights and obligations are affected by the substitution of the new route for the old. If the new route, made necessary by the closing of the old, is substantially different, the contract would be at an end, however slight the effect of the change might be on the parties. That appears to me to be quite unreasonable; in effect, it means writing the old route into the contract, although the parties have chosen not to say anything about the matter. On the other hand, if the rule is to ascertain the route at the time of performance, then the question whether the seller is still bound to ship the goods by the new route does depend on the circumstances as they affect him and the buyer, whether or not they are such as to infer frustration of the contract. That appears to me much more just and reasonable and, in my opinion, that should be held to be the proper interpretation of the rule."

As regards the increase in the rate of the freight from £ 7.10 to £ 15 per ton consequent on the change of the route, it has been significantly remarked in this judgment: "I need not consider what the result might be if the increase had reached an astronomical figure." Perhaps it was suggested that the increase from £ 7.10 to £ 15 was not such an increase and therefore could be absorbed by the risk taken

by the seller in entering into the contract. If it had been astronomical, perhaps different consideration would have arisen.

In this case, the stores shipped were groundnuts and the voyage was to begin at Port Sudan and to end at Hamburg. The increase of the duration of the voyage from three weeks to seven weeks and the ship on its voyage via the Cape of Good Hope having to cross the Equator twice did not have the effect of damaging the cargo of groundnuts. It has been observed in this judgment: "There might be cases where damage to the goods was likely result of the longer voyage which twice crossed the Equator or perhaps the buyer would be prejudiced by the fact that the normal duration of the voyage viz. Suez was about three weeks whereas the normal duration via the Cape was seven weeks. But there is not such thing in this case that the longer voyage could damage the groundnuts or that the delay could have caused loss to those buyers of which they could complaint." Perhaps if the cargo was perishable and if the price of the stores shipped were falling in the market, the situation would have been different.

The Court has considered the altered nature of the voyage and addressed itself to the task of analyzing as to what was the difference between the two so as to take a decision whether there was change in the significance of the obligation and the difference was radical enough as to qualify for frustration.

The obligation of the seller was to find a ship proceeding to the destination by a practicable and a reasonable route. There may be a commercial difference between paying £ 7.10 and paying £ 15 per ton freight, but the performance

was not fundamentally different. It must be held that the performance was fundamentally different in a legal sense, not merely in a commercial sense. Lord Radcliffe in this case has considered the question of the obligation of the seller and stated: “The real issue as I see it, is to determine how to define the obligation of the appellants, the vendors, under the sale contract of October 4, 1956, so far as it related to shipment of the goods sold and the provision of shipping documents. Once it is settled what that definition should be, there is not much difficulty in seeing what are the legal consequences that should follow, having regard to the facts found for us by the Special Case.

“This is a sale of goods on c.i.f. terms. Such a sale involves a variety of obligations, both those written out in the contract itself and those supplied by implication of law for the business efficacy of the transaction. The only sector of these obligations that is relevant for the purpose of this case is the vendor’s duty “to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract.” (*Biddell Brothers v. E. Clemens Horst Co.*[27] per Hamilton, J.). Even within this sector, however, there are gaps, which the law has to fill in; for instance, what form of contract of affreightment will meet the needs of the transaction, and route or routes are permissible for the carrying vessel selected? In the present case, nothing turns on the form of the bill of lading, which is not in evidence; everything turns on the question of route. The written contract makes no condition about this, its only stipulation being that shipment is to be from an East African port, by which we are asked to assume that the parties in fact meant Port Sudan. So the

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[27] *Biddell Brothers v. E. Clemens Horst Co.*

voyage was to begin at Port Sudan and to end at Hamburg. The primary duty under this part of the contract was to dispatch the groundnuts by sea from one port to destination of the other. At the date when the contract was entered into, the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Europe was to be shipped via the Suez Canal. It would be unusual and rare for any substantial parcel of Sudanese groundnuts from Port Sudan to Europe to be shipped via the Cape at any time when the Suez Canal was open. The Suez Canal was blocked on November 2, 1956, and remained blocked until April 1957. Nevertheless during the months of November / December, 1956 the period in which the vendors had to ship under the contract, it was feasible for them to transport the goods via the Cape of Good Hope. It would have invoked a voyage of some 11,137 miles as against 4,386 miles by way of Suez, and it would have meant a rise in freight rate of twenty-five per cent (and, in the last two weeks of December, one hundred per cent), above that ruling when the sale contract was made. These differences did not, however, in the opinion of the Board of Appeal of the Incorporated Oil Seed Association who state the Case, render transport by the Cape route commercially or fundamentally different from transport by way of the Suez Canal."

Lord Simon while agreeing with the above conclusion observed : "……..the Courts refuse to apply the doctrine of frustration unless they consider that to hold the parties to further performance would, in the light of the changed circumstances, alter the fundamental nature of the contract.

Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. (1962).[28]

Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., Diplock, L.J.: Every synallagmatic contract contains in it the seeds of the problem; in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done? The contract may itself expressly define some of these events, as in the cancellation clause in a charter-party, but human prescience being limited, it seldom does so exhaustively and often fails to do so at all. In some classes of contracts, such as sale of goods, marine insurance, contracts of affreightment evidenced by bills of lading and those between parties to bills of exchange, Parliament has defined by statute some of the events not provided for expressly in individual contracts of that class; but, where an event occurs the occurrence of which neither the parties nor Parliament have expressly stated will discharge one of the parties from further performance of his undertakings, it is for the court to determine whether the event has had this effect or not. The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing; does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings? This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract but the consequences of the event are

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28 *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. (1962)* 2 QB 26 : (1962) 1 All ER 474.

different in the two cases. Where the event occurs as a result of the default of one party, the party in default cannot rely on it as relieving himself of the performance of any further undertakings on his part, and the innocent party, although entitled to, need not treat the event as relieving him of the performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong. Where the event occurs as a result of the default of neither party, each is relieved of the further performance of his own undertakings, and their rights in respect of undertakings previously are now regulated by the Law Reform (Frustrated Contracts) Act, 1943.

The problem is this; when will a party to a contract be relieved of his undertaking to do that which he has agreed to do but has not yet done? This has exercised the English Courts for centuries, probably ever since *assumpsit* emerged as a form of action distinct from covenant and debt, and long before even the earliest cases which we have been invited to examine; but until the rigour of the rule in *Paradine v. Jane*[29] was mitigated in the middle of the last century by the class judgment of Blackburn, J., in *Taylor v. Caldwell*,[30] and in *Jackson v. Union Marine Insurance Co.,*[31] it was in general only events resulting from one party failure to perform his contractual obligations which were regarded as capable of relieving the other party from continuing to perform that which he had undertaken to do. It was not, however, until Jackson v. Union Marine Insurance Co. that

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29 *Paradine v. Jane,* 1647 Aleyn 26.

30 *Taylor v. Caldwell,* (1863) 3 B & S 826.

31 *Jackson v. Union Marine Insurance Co.,* (1874) LR 4 QB 180.

it was finally recognized that it was the happening of the event and not the fact that the event was the result of a breach by one party of his contractual obligations that relieved the other party from further performance of his obligations.

In 1874, when the doctrine of frustration was being foaled by “impossibility of performance” out of “condition precedent”, it is not surprising that the explanation given by Bramwell, B., should give full credit to the idea by suggesting that in addition to the express warranty to sail with all possible dispatch there was an implied condition precedent that the ship should arrive at the named port in time for the voyage contemplated. In *Jackson v. Union Marine Insurance Co.* there was no breach of the express warranty; but, if there had been, to engraft the implied condition on the express warranty would have been merely a more complicated way of saying that a breach of a shipowner’s undertaking to sail with all possible dispatch may, but will not necessarily, give rise to an event which will deprive the charterer of substantially the whole benefit which it was intended that he should obtain from the charter. Now that the doctrine of frustration has matured and flourished for nearly a century and the old technicalities of pleading “condition precedent” are more than a century out of date, it does not clarify, but on the contrary obscures, the modern principle of law where such an event has occurred as a result of a breach of an express stipulation in a contract, to continue to add the now unnecessary colophon, “therefore it was an implied condition of the contract that particular kind of breach of an express warranty should not occur.”

The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their ancestors.

Sellers L.J. and Upjohn L.J. delivered judgment to the same effect, dismissing the appeal.

Ocean Tramp Tanker Corporation v. V/O Sovfracht (The 'Eugenia') (1964).[32]

Ocean Tramp Tanker Corporation v. V/O Sovfracht (The 'Eugenia') is the case marking a milestone in the development of Law of Frustration of Contract. The facts of that case were: "The plaintiffs chartered to the defendants the m.v. Eugenia then at Genoa on a time charter for a 'trip out to India via the Black Sea' and back. The charter provided that the vessel was 'not to be ordered to, nor continue in, any place which would bring her within a zone which was dangerous as the result of any actual or threatened hostilities'. In breach of this provision, the defendants allowed the Eugenia to enter the Suez Canal when hostilities had already commenced and she was trapped there when the canal was blocked. The plaintiffs claimed that the defendants had repudiated the charter by their conduct. The defendants resisted their claim on the ground inter alia that the charter-party was frustrated by what took place." On these facts the Court of Appeal, Lord Denning upheld the plaintiff's contention observing: "The defendants could not rely on the fact that the ship was trapped, for this was due to their own default. Nor could they claim that the charter-party had been frustrated by the

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32 *Ocean Tramp Tanker Corporation v. V/O Sovfracht (The 'Eugenia')* (1964) 2 QB 226.

closure of the canal, for this did not bring about a fundamentally different situation such as to frustrate the venture. The alternative route available around the Cape was not fundamentally different, but merely longer and more expensive; and the cargo was not of such a nature as to be adversely affected by the longer voyage. In any event, the extra time taken could not be considered excessive when matched with the duration of the whole journey out to India and back. So the defendants were liable for breach."

Staffordshire Area Health Authority v. South Staffordshire Waterworks Co. (1978).[33]

In 1908 the predecessors in title of the plaintiffs owned a hospital, which took its water from its own well. Under a private Act of 1909, the defendants were empowered to pump water from a well a mile away, subject to providing the hospital with any water, which it needed, if the supply from the hospital's well was reduced. The rate was to be that which it would have cost the hospital to get the water from their own well and disputes were to be subject to arbitration. By 1918 there was a deficiency, which was supplied by the defendants, and in 1927 the hospital decided to abandon their well. In 1929 a contract was then concluded under which 'at all times hereafter' the hospital was receive 5,000 gallons of water a day free and all the additional water it required at the rate of 7d (2.9p) per thousand gallons. By 1975 the normal rate was 45p per 1,000 gallons and the Water Company claimed to be entitled to terminate the agreement by giving six months' notice."

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33 *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.,* (1978) 3 All ER 769 : (1978) 1 WLR 1387.

On these facts the Court of Appeal, Lord Denning held that – "the contract had been frustrated by inflation 'outside the realm of their speculations altogether, or of any reasonable person sitting in their chairs'." Commenting on this Cheshire, Fifoot and Furmston's have said[34]: "It is clear law that frustration brings the contract to an end automatically but in this case Lord Denning, M.R. held that the effect of inflation was to render the contract terminable by reasonable notice. Presumably this is because this was all that the Water Authority were claiming but it relieved him from the onerous task of deciding when the inflation rate became sufficiently great to frustrate the contract". ……."With respect, however, this view, which was not concurred in by the other members of the Court is either wrong or involves a massive change in the law as previously understood. There are thousands, if not millions, of contracts potentially within the scope of this principle, for example, long leases for 99 years or more at fixed ground rents or long-term policies of life insurance. Furthermore, the facts of the case would not appear to satisfy Lord Denning, M.R.'s own test since in 1929 hyper-inflation was a well-known phenomenon which had recently devastated the economies of several European countries."

National Carriers Ltd. v. Panalpina (Northern) Ltd. (1981).[35]

The facts of the case were that there was a lease of a warehouse between the parties. Subsequent to the execution of the lease, access to the warehouse was closed

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34 Cheshire, Fifoot and Furmston, 11th edition, p. 563, *Law of Contract.*

35 *National Carriers Ltd. v. Panalpina (Northern) Ltd*., (1981) 1 All ER 161

by Local Authority. The question arose whether the lease was frustrated? House of Lords observed: "Although by the time access to warehouse was restored, the appellants would have lost two out of 10 years' use of the warehouse and their business would have been severely disrupted, but closure of the access to the warehouse would have been sufficiently grave to amount to a frustrating event since there would be further three years of the lease remaining after access was re-established.

"The actual decision in the National Carriers case was that events which prevented one of the parties from putting the subject-matter to its intended use were not sufficiently serious to frustrate the contract. In this respect, the case, so far from departing from, actually illustrates, the approach adopted in the British Movietonews case. It is pertinent to note that in the National Carriers case Lord Roskill has referred to inflation as one of the circumstances in which doctrine of frustration may be invoked sometimes with success, sometime without." [36]

Case of 'The Nema' (1981). [37]

The facts of the case were that by a charter party dated 02.11.1978, the owners of a vessel chartered her for six or seven consecutive voyages from Sorel in Canada to ports in Europe between April and December 1979. The charterers were entitled to cancel for any voyage for which the vessel was not ready for loading by 5th December 1979 and were not liable to pay freight in respect of time lost in loading on account of strikes. A strike broke out at Sorel when the vessel was away on the first voyage and was still in

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36 Trietel, (1987), 7th edition, p. 665, *Law of Contract.*

37 'The Nema', (1981) 2 All ER 1030.

progress when she arrived back at Sorel on 20th June 1979, preventing her from being loaded for second voyage. Owners claimed that the charter party was at an end because of frustration. The Arbitrator held that it was frustrated. The award was upheld ultimately by House of Lords observing: "Although the question of frustration is never a pure question of fact and ultimately always, involves a question of law, whether the frustrating event has made performance of the contract something which is radically different from that which was undertaken by the contract, that is not, in itself, sufficient to justify the court in granting leave to appeal from the Arbitrator's decision or in imposing its own view in place of that of the Arbitrator .....There is no reason, in principle, why a strike should not be capable of causing frustration of an adventure by delay. It cannot be right to divide causes of delay into classes and then to say that one class can and another class cannot bring about frustration. It is not the nature of the cause of delay which matters so much, as the effect of that cause on performance of the obligations."

BP Exploration v. Hunt (1982).[38]

The defendant had received from the Libyan government a concession to explore for and extract oil in the Libyan Desert. He entered into an arrangement with the plaintiffs under which he agreed to transfer a half-share in the concession to them and they agreed to explore, develop and operate the concession at their own expense. If oil was discovered in commercial quantities and exploited the plaintiffs would be able to recover this initial expenditure

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38 *BP Exploration v. Hunt,* (1982) 1 All ER 925.

from the defendant's share of the revenues from the oil. In effect if all worked well and oil was discovered in commercial quantities, the plaintiffs would recover their exploration costs and thereafter have a half-share in the oil; if oil was discovered the defendant would not have to bear any part of the cost of exploring for it.

In fact oil was discovered in very large quantities on the concession and the parties began to exploit the concession, but before all the costs could be recovered by the plaintiffs there was a change of regime in Libya and the plaintiffs, and then later the defendants, were expelled from the country. The Libyan Government expropriated the plaintiff's half-share in the concession in December 1971 and the defendant's half-share in 1973. The plaintiffs claimed that the contract was frustrated and that under the Law Reform (Frustrated Contracts) Act, 1943 they were entitled to recover.

Kodros Shipping Corpn. v. Empresa Cubana de Fletes, the Evia (1982).[39]

The Evia was on an eighteen-month charter in Baltimore due to expire on 20 May 1981. In mid-March 1980 charterers ordered her to Basrah. She arrived, discharged her cargo and was ready to leave at 1000 hours on 22nd September 1980. War broke out and she was unable to leave. Hire had been paid up to 4th October 1980 but charterers refused further hire, claiming that the contract was frustrated. The matter was referred to arbitration and decided by Mr. Basil Eckersley Q.C. as umpire. From his decision an appeal was taken to the Commercial Court

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39 *Kodros Shipping Corpn. v. Empresa Cubana de Fletes,* the Evia (1982) 3 All ER 350.

(Robert Goff [1982] 1 Lloyd's Rep. 613), thence to the Court of Appeal (Lord Denning, M.R., Sir Sebag Shaw and Ackner, L.J. [1982] 1 Lloyd's Rep. 334) and finally to the House of Lords.

The charter-party contained two relevant clauses. Clause 2 required that the vessel be employed only 'between good and safe ports'. Clause 21 prohibited the sending of the vessel into a war zone without prior consent of the owners and obliged the charterers to pay the costs of insurance and modified the 'off-hire' clause, so that, if delayed in a war zone in circumstances under which hire would under that clause generally cease to be payable, it should nevertheless remain payable. It was (eventually) common ground that Basrah was safe when the Evia was ordered thither and safe when she entered the port. It was also the fact that the shipowners had agreed to the order that she proceed to Basrah, which was admittedly a war zone within the meaning of Clause 21 at all relevant times.

In arbitration, the umpire found that Basrah was a safe port when the vessel was ordered to proceed there and when she got there and that it did not become unsafe until 22nd September by which time it was impossible to leave -. Therefore, charter party was frustrated on 4th October 1980. On appeal by owners, the judge reversed the decision holding that clause 2 – stipulated safe port – i.e. port warranted by the charterers to be safe throughout the period of the vessel's contractual service there and the frustration was self induced.

The Court of Appeal held that Basrah was a safe port when the vessel was ordered there – and outbreak of hostilities was an event contemplated by parties.

House of Lords dismissed the appeal of the owner, holding, “A port was not safe unless in the relevant period the ship could reach it, use it and return from it, in the absence of abnormal occurrence – There was no breach of Clause 2 -.”

4.8 SYSTEMATIC AND SUITABLE DEVELOPMENT OF DOCTRINE OF FRUSTRATION:

Review of the chronological catalogue of cases reveals that while developing the Law of Frustration, judges have been propounding propositions haltingly and hesitatingly as it was an in-road into the previous proposition of law regarding absolute liability of the party under the contract. While the proposition that supervening events could qualify for frustration which rendered the performance of the contract impossible, has been firmly established, judicial justification for the doctrine has been varying with the different judges. It would be interesting to analyse the various approached and the justifying theories propounded from time to time in support of the doctrine. This doctrine meant different things to different persons from different angles, though substantially and basically it is the same. Curiously even the juristic principles propounded in respect of this doctrine have differed, but its practical application has been the same. It would make an interesting study as to how different authors have treated the subject. Different authors have considered the development of the doctrine in their own fashion but substantially, in ultimate analysis it is the same. Perhaps a brief running summary of different authors would be of interest.

In the words of Anson:[40]

"Before 1863 it was a general rule of contract that a man was absolutely bound to perform any obligation which he had undertaken and could not claim to be excused by the mere fact that performance had subsequently become impossible ..... So in *Paradine v. Jane*[41] in 1647 the Court held that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." .....It has always, however been open to the parties to introduce an express provision into their agreement that the fulfillment of a condition or the occurrence of an event should discharge one or both of them from some or all of their obligations under it and just as the parties may expressly discharge their obligations to perform a contract, so there are cases in which a contract, though containing no express provision, will be interpreted by the courts as containing such a provision by implication. An implication of this nature would, it might be thought, readily be made where, without the fault of either party, an event occurs which renders the contract not merely more onerous but completely impossible of performance. This was the device used in the case of *Taylor v. Caldwell*[42] in 1863 in order to introduce an exception to the existing law. It was held in that case "the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." From this time

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40 Anson, 26th edition, p. 440, *Law of Contracts.*
41 *Paradine v. Jane,* (1647) Aleyn 26.
42 *Taylor v. Caldwell,* (1863) 3 B & S 826.

onwards the courts showed themselves prepared to hold that unless a contrary intention appears the continuance of a contract is conditional upon the possibility of its performance.

It was not long, however, before the new doctrine was extended outside the sphere of literal impossibility to situations where there had been a 'frustration of the adventure'. Most of the early frustration cases arose out of delay, attributable to the fault of neither party, in the carrying out of charter-parties; and they seem at first to have been treated as raising a question, which was regarded as connected, rather than identical, with that raised by the cases of impossibility.[43]

From the aforesaid analysis the judicial basis of the doctrine has been catalogued as under: -

(a) The Implied Term.
(b) Disappearance of the foundation of the contract.
(c) The Just and Reasonable Solution.
(d) Change in the obligation.

While the English law has developed and above, it is for consideration whether the Indian law has developed or remained static. Section 56 of the Indian Contract Act embodies the doctrine of frustration as obtained in India:

> *Section 56: An agreement to do an act impossible in itself is void.*

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[43] *Jackson v. Union Marine Insurance Co. Ltd.,* (1874) LR 10 CP 125.

A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promise did not know to be impossible or unlawful, such promisor must make a compensation to such promise for any loss which such promise sustains through the non-performance of the promise.

Though the English Law had taken notice of the changed circumstances in 1863, the courts while interpreting the Indian Contract Act of 1872 still seem to stick to the idea of absolute liability, as the series of rulings, e.g., *Ganga Saran v. Firm Ram Charan Ram Gopal* and *M/s. Alopi Parshad and Sons Ltd. v. Union of India,*[44] would indicate. However, it must be noticed that in all these rulings it has been emphasized that if the parties have undertaken absolute liability under the contract, they have to thank themselves and court cannot absolve them. But if the contract is not in absolute terms, but silent on the point of change of circumstances, which have an impact on the performance, would the promisor be relieved of his promise? No ruling seems to give a specific answer to this question, but the general impression one gathers from the Indian ruling is that they still stick to the doctrine of absolute liability embodied in the classis English ruling of *Paradine v. Jane*.[45] While the English Common Law traveled a long way, the Indian Law seems to be static.

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44 *Ganga Saran v. Firm Ram Charan Ram Gopal*, AIR 1952 SC 9 and *M/s. Alopi Parshad and Sons Ltd. v. Union of India* AIR 1960 SC 588.

45 *Paradine v. Jane,* (1647) Aleyn 26.

4.9 PRIVY COUNCIL DECISIONS:

Categories of frustration are never closed. It has meant different things to different persons. After considering the Supreme Court decisions, which constitute the law of the land, it may be of interest to consider some of rulings of Privy Council to get an idea as to how the doctrine of frustration has been considered.

"Where a contract stated that certain conditions therein would be void, if there will be any fluctuation in the rates issued by a certain syndicate. Held, that the non-issue of the rates by the Syndicate due to its ceasing to exist did not bring into operation the condition rendering the contract void."[46]

Huranandrai Fulchand v. Pragdar Budhsen, (1923)[47]

In *Huranandrai Fulchand v. Pragdar Budhsen,* Privy Council has observed: "To interpret a business bargain, expressed in the language of commerce, it is no doubt important to appreciate the methods and the point of view of business men, but this is merely a prudent way of qualifying the mind to construe their words and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and form this concluding that, whatever the words of the contract say, that kind of liability, and that alone, is the obligation of the contract. As a matter of fact there is nothing surprising in a merchant's binding

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46 *Toolsidas v. Venkatachallapathy,* AIR 1921 PC 46.

47 *Huranandrai Fulchand v. Pragdar Budhsen, AIR 1923 PC 54.*

himself to procure certain goods at all events. It is a matter of price and of market expectations. No doubt it is a speculation, but many dealings even in cotton goods are of that character.

Where the vendor performed subsequent contract with Govt. during war after breaking the contract with plaintiff to supply goods as and when they may be received from mills. Held the adventure, of which the commercial purpose is suggested to have been frustrated, is, of course, the purchase and sale of these goods between the parties to this contract and this adventure was not frustrated. All that happened was, that the defendants failed to perform their contract. When they have paid the damages, one commercial purpose, at any rate, will, so far from being frustrated, have been fulfilled. The Mills, from which the goods were to come, no doubt were contemplated as continuing to exist, though it does not follow that in a bargain and sale the closing or even the destruction of the Mills would affect a contract between third parties, which is in terms absolute, but in this case the Mills did continue to exist and did continue to manufacture the goods in question, only they were made for and delivered to somebody else.

This is completely outside the principle of *Taylor v. Caldwell*[48] or of the Coronation case *Krell v. Henry*[49], where the contract provided that goods are to be delivered as and when the same may be delivered from the mills. Held this should not be construed to mean 'if and when the same may be received from the mills, to construe in this way is to convert words, which fix the quantities and times for

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48 *Taylor v. Caldwell,* (1863) 3 B & S 826.
49 *Krell v. Henry)*, (1903) 2 KB 740

deliveries by installments into a condition precedent to the obligation to deliver at all, and virtually makes a new contract. The words certainly regulate the manner of performance, but they do not reduce the fixed quantity sold to a mere maximum or limit the sale to such goods not exceeding the agreed bales, as the Mills might deliver to the defendants during the agreed period."

***T.O.T. Co. v. Uganda Sugar Factory*, (1945)[50]**

In *T.O.T. Co. v. Uganda Sugar Factory*, Privy Council has observed: "The doctrine of frustration may apply to a contract for unascertained goods. T Company contracted to supply steel rails Krupp section to U company. A carefully drawn specification denied precisely what were the goods called for by the contract. That specification did not define what was to be the source of the goods.

The contract was silent on the point: Held that to introduce into the specification the term that the goods should be the manufacture of Ferrosteel would be to vary the contract by defining what the contract had left open. The contract was not frustrated because only one of the many possible ways of performing it had become illegal and impossible. The parties to the contract did not contract on the footing or common assumption that the goods sold would come only from Germany."

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50 *T.O.T. Co. v. Uganda Sugar Factory*, AIR 1945 PC 144.

4.8 LANDMARK DECISIONS OF SUPREME COURT AND HIGH COURTS:

Jagatjit Distilling and Allied Industries v. Bharat Nidhi Ltd., (1978)[51]

The ghost of absolute liability of contract haunts the Indian Courts. While the English Courts have been able to shake off the shackles of absolute liability and come to grips with the realities of commercial transactions and taken note of change of circumstances resulting in making the contract commercially sterile and therefore discharged by frustration, Indian Courts have not yet been bold enough to do so except perhaps Delhi High Court in a ruling of *Jagatjit Distilling and Allied Industries v. Bharat Nidhi Ltd.*

Satyabrata Ghose v. Mugneeram Bangur and Co., (1954)[52]

Hon'ble Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur and Co.,* has observed that the English Law of frustration does not apply to India and yet have referred to the English rulings 12 in number, (out of a total of 14 referred, only two being Indian), and that too referred with approval and not just referred and dismissed as inapplicable. Supreme Court has stated in para 9 at page 46, column 1 that the first paragraph of section 56 lays down the law in the same way as in England. The second paragraph enunciates the law relating to discharge of contract by reason the supervening impossibility or illegality of the Act agreed to be done. The wording of this paragraph is quite general. The Supreme Court has not

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51 *Jagatjit Distilling and Allied Industries v. Bharat Nidhi Ltd.* ILR 1978 I Delhi 526.

52 *Satyabrata Ghose v. Mugneeram Bangur and Co.* AIR 1954 SC 44.

observed as to how the second paragraph of section 56 differs from the English Law of Frustration nor have they confirmed that it is the same. While discussing the connotation of the word “impossible” occurring in second paragraph, Supreme Court has drawn on the English rulings, which have been quoted with approval. This would lead one to the inference that the Indian Law of Frustration embodied in second paragraph of section 56 is not different from the English Law.

The Supreme Court has observed in Para 9 that “that word ‘impossible’ has not been sued here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.” These very words have been lifted from English rulings. Supreme Court goes so far as to observe in Para 17 at page 49, column 1: “A contention in the extreme form that the doctrine of frustration as recognized in English Law does not come at all within the purview of section 56 of the Indian Contract Act cannot be accepted.” This would only mean that the English Law of Frustration is materially the same as the Indian Law of Frustration embodied in section 56 of the Indian Contract Act. Yet the hesitancy on the part of the Supreme Court to say so in simple and categorical words is not understandable. It would seem that the decision turned on the fact that the disturbing factor, requisitioning of the property in question during the war, was not an unforeseen or uncontemplated event as the contract was entered into

during the war. Therefore, on facts section 56 was not attracted, but as Supreme Court has made observations on the legal aspect of the doctrine of frustration and interpretation of section 56 of the Contract Act, this ruling has almost become a classic ruling on the point.

***Kesari Chand v. Governor-General in Council*, (1949)[53]**

The question was considered and discussed by a Division Bench of the Nagpur High Court in *Kesari Chand v. Governor-General in Council*, and it was held that the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. The doctrine is a special case of impossibility and as such comes under section 56 of the Indian Contract Act.

We are in entire agreement with this view which is fortified by a recent pronouncement of this Court in *Ganga Saran v. Firm Ram Charan Ram Gopal*,[54] Fazi Ali, J., in speaking about frustration observed in his judgment as follows :

> 'It seems necessary for us to emphasize that so far as the courts in this country are concerned, they must look primarily to the law as embodied in sections 32 and 56 of the Indian Contract Act, 1872'."

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53 *Kesari Chand v. Governor-General in Council*, ILR (1949) Nag 718 (C).

54 *Ganga Saran v. Firm Ram Charan Ram Gopal*, AIR 1952 SC 9.

***M/s. Alopi Parshad and Sons Ltd. v. Union of India*, (1960)[55]**

The next Hon'ble Supreme Court ruling is, *M/s. Alopi Parshad and Sons Ltd. v. Union of India*:

> "Parties to an executory contract are often faced in the course of carrying it out with a turn of events which they did not at all anticipate. Yet this does not in itself affect the bargain they have made."

It may be noticed that the decision of the Hon'ble Supreme Court reported in AIR 1960 SC 588 is in the context of the point whether the Arbitrator can ignore the express terms of the contract and award to the contractor a rate higher than stipulated on grounds of equity or on the plea of *quantum meruit*, the measure of the charges being the actual expenditure incurred. The Hon'ble Supreme Court decision on the point was that the Arbitrator cannot ignore the express terms of the contract and award rates differ from the stipulated rates on some vague plea of equity and that compensation *quantum meruit* cannot be awarded when the rate is fixed by the contract for services rendered in pursuance of the terms of the contract. In deciding this question the Supreme Court has observed that parties to an executory contract are often faced in the court of carrying it out with a turn of events which they did not anticipate and they have illustrated the same by saying that there may be abnormal rise or fall in prices, sudden depreciation of currency, etc.

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55 *M/s. Alopi Parshad and Sons Ltd. v. Union of India,* AIR 1960 SC 588.

The above general proposition is unexceptionable, but it is the exception made to it by the Supreme Court that requires careful consideration. To quote the words of the Supreme Court, "If, on the other hand, a consideration of the terms of the contract in the light of circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract but because on the true construction it does not apply in that situation." The change of circumstances pleaded has to be analysed against the background of the circumstances obtained at the time of entering into the contract and contrasted with the impact of the change of circumstances on the performance of the contract with a view to determine whether the obligation after the changed circumstances is radically (fundamentally) different and whether the change of circumstances strikes at the root of the contract. If the answer is in the affirmative, the result is that the contracted is frustrated.

It is significant that the plea of change of circumstances (increased charges for establishment and contingencies, etc. due to World War II) in Alopi Prashad's case was negatived by the Supreme Court on the ground that the parties had modified the agreement by increasing the rates by mutual consent on June 20, 1942 with retrospective effect, 11th September, 1940, and, therefore, the modified agreement was entered into against the background of the World War II and therefore the plea of change of circumstances as frustrating the contract was factually incorrect. Supreme Court has gone so far as to observe at page 593, column two of the Report: "This argument is

untrue in fact and unsupportable in law. The contract was modified on June 20, 1942 by mutual consent and the modification was made nearly three years after the commencement of the hostilities. The agents were fully aware of the altered circumstances at the date when the modified schedule for payment of overhead charges, contingencies buying remuneration was agreed upon. Again, a contract is not frustrated merely because the circumstances in which the contract was made are altered."

It is submitted that this is the crux of the ruling of the Supreme Court. Mere alteration of circumstances is not enough. In this case the alteration was further increased in the rates due to war conditions. It was not an unexpected event vis-à-vis the modified agreement of 20th June, 1942. But if the agreement had not been modified and the plea of altered circumstances was advanced vis-à-vis the original agreement of 3rd May, 1937, when the war had intervened in September, 1939, it was quite possible that the exception propounded by the Supreme Court would have been made applicable and the plea accepted.

It may be noticed that the relief given is not on the basis that the court has absolving power. But while construing the contract vis-à-vis the changed circumstances court comes to the conclusion that it does not apply in the changed situation so that the promise can well say, "it was not this that I promised to do (*Non haec in foedera veni*).

***Mugneeram Bangur and Co. (P) Ltd. v. Gurbachan Singh*, (1965)[56]**

The ruling of AIR 1959 Calcutta 576 has been affirmed by the Hon'ble Supreme Court in *Mugneeram Bangur and Co. (P) Ltd. v. Gurbachan Singh*. In that case it has been held:

"If time is of essence of the contract or if time for performance is set out in the contract it may be that the contract would stand discharged even though its performance may have been rendered unlawful for an indeterminate time provided unlawfulness attached to the performance of the contract at the time when the contract ought to have been performed. Thus, where the performance of a contract had been rendered unlawful by reason of some subsequent event the contract would stand discharged but such discharge will take place not necessarily from the date on which the further performance was rendered unlawful, unless further performance was rendered unlawful for all time. If the performance of the contract is rendered unlawful, either for a determinate period of time or for an indeterminate period of time, the contract would not stand discharged unless the ban on its performance existed on the day or during the time in which it has to be performed."

Naihati Jute Mills Ltd. v. Khyaliram Jagannath, (1968)[57]

Subsequently, Hon'ble Supreme Court in *The Naihati Jute Mills Ltd. v. Khyaliram Jagannath*:

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56 *Mugneeram Bangur and Co. (P) Ltd. v. Gurbachan Singh,* AIR 1965 SC 1523.

57 *The Naihati Jute Mills Ltd. v. Khyaliram Jagannath,* AIR 1968 SC 522

> "Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. Since under the Contract Act a promise may be expressed or implied, in cases where the court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56. Although in English Law such cases would be treated as cases of frustration, in India they would be dealt with under section 32."

In a majority of case, however, the doctrine of frustration is not applied on the ground that the parties themselves agreed to an implied term, which operated to release them from performance of the contract. The court can grant relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract. There would in such a case be no question of finding out an implied term agreed to by the parties embodying a provision for discharge. When such an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs it is the court which can pronounce the contract to be frustrated and at an end. This is really a positive rule enacted in Section 56, which governs such situations.

The doctrine of discharge by frustration cannot be available where the contract makes full and complete provision, so intended, for a given contingency. The reason is that where there is an express term the court cannot find, on construction of the contract, an implied term inconsistent with such express term.

Seth Mohan Lal v. Grain Chambers Ltd., Muzaffarnagar (1968)[58]

Hon'ble Supreme Court in *Seth Mohan Lal v. Grain Chambers Ltd., Muzaffarnagar* has held:

Since the promulgation of Sugar and Gur (Futures and Options) Prohibition Order (1950), fresh contracts in future transactions were prohibited, but settlement of the outstanding contracts by payment of differences was not prohibited, nor was delivery of Gur in pursuance of the contract and acceptance thereof at the due date by the Company prohibited. Imposition of restraint on transport of Gur except with the permission of the Government does not amount to an impossibility contemplated by section 56 leading to frustration of the contracts.

Raja Dhruv Dev Chand v. Raja Harmohinder Singh (1968)[59]

Hon'ble Supreme Court in *Raja Dhruv Dev Chand v. Raja Harmohinder Singh* has held:

Under section 56, where an event, which could not reasonably have been in the contemplation of the parties

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58 *Seth Mohan Lal v. Grain Chambers Ltd., Muzaffarnagar,* AIR 1968 SC 772.

59 *Raja Dhruv Dev Chand v. Raja Harmohinder Singh,* AIR 1968 SC 1024.

when the contract was made, renders performance impossible or unlawful, the contract is rendered void, and the parties are excused from performance of their respective obligations. Therefore, where performance is rendered by intervention of law invalid, or the subject-matter assumed by the parties to continue to exist is destroyed, or a state of things assumed to be the foundation of the contract fails, or does not happen, or where the performance is to be rendered personally and the person does or is disabled, the contract stands discharged.

No useful purpose will be served by referring to the judgments of the Supreme Court of the United States of America and the Court of Session in Scotland to which our attention was invited. Section 56 of the Contract Act lays down a positive rule relating to frustration of contracts and the courts cannot travel outside the terms of that section. The view expressed by the East Punjab High Court in *Parshotam Das Shankar Das v. Municipal Committee, Batala*,[60] that section 56 of the Contract Act is not exhaustive of the law relating to frustration of the contracts in India must be deemed not to be good law to that extent.

Bhoothalinga Agencies, v. V.T.C. Poriaswami Nadar (1969)[61]

Hon'ble Supreme Court in *Bhoothalinga Agencies, v. V.T.C. Poriaswami Nadar* has held:

The doctrine of frustration of contract is really an aspect or part of the law of discharge of contract by reason of

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60 *Parshotam Das Shankar Das v. Municipal Committee, Batala,* AIR 1949 EP 301.

61 *Bhoothalinga Agencies, v. V.T.C. Poriaswami Nadar,* AIR 1969 SC 110.

supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of the section 56 of the Contract Act.

In English Law the question of frustration of contract has been treated by courts as a question of construction depending upon the true intention of the parties. In contrast, the statutory provisions contained in section 56 of the Contract Act lay down a positive rule of law and English authorities cannot therefore be of direct assistance though they have persuasive value in showing how English Courts have approached and decided cases under similar circumstances.

The provisions of section 56 of the Contract Act cannot apply to a case of “self-induced frustration”. In other words, the doctrine of frustration of contract cannot apply where the event, which is alleged to have frustrated the contract, arises from the act or election of a party.

The disposal of imported chicory, which arrived at Madras pot on December 13, 1955, was governed by the provisions of the Imports (Control) Order, 1955 which came into force on December 7, 1955. Clause 5(4) of the 1955 Order expressly provided that the licensee shall comply with all the conditions imposed or deemed to be imposed under that clause one of which was that the goods will not be sold. Therefore, the sale of the imported goods would be a direct contravention of clause 5(4) and under section 5 of the Imports and Exports (Control) Act, 1947 any contravention of the Act or any order made or deemed to have been made under the Act was punishable with imprisonment upto one year or fine or both. In consequence, even though the contract was enforceable on November 26, 1955 when it

was entered into, the performance of the contract became impossible or unlawful after December 7, 1955 and so the contract became void under section 56 of the Contract Act after the coming into force of the Imports (Control) Order, 1955. This was not a case of 'self-induced frustration'. There was no choice or election left to the party to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the licence upon the party not to sell the imported chicory to any other party but he was permitted to utilize it only for consumption as raw material in his own factory.

Smt. Sushila Devi v. Hari Singh, (1756)[62]

The next ruling for consideration is *Smt. Sushila Devi v. Hari Singh* :

The supervening event need not render the contract physically impossible. The impossibility contemplated by section 56 of the Contract Act is not confined to something, which is not humanly possible. But if the performance of a contract become impracticable or useless having regard to the object and purpose, the parties had in view, then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract.

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62 *Smt. Sushila Devi v. Hari Singh,* AIR 1971 SC 1756.

Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai, (1977)[63]

Hon'ble Supreme Court in *Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai* has held that:

"The parties are, therefore, governed purely by section 56 of the Contract Act according to which a contract becomes void only if something supervened after its execution which renders it impracticable. On the contention advanced on behalf of the respondents, the question that arises is whether the above quoted order of the Prant Officer, Thana Prant, dated December 8, 1958, rendered the contract impracticable. The answer to this question is obviously in the negative. The said order, it will be noted, was not of such a catastrophic character as can be said to have struck at the very root of the whole object and purpose for which the parties had entered into the bargain in question or to have rendered the contract impracticable or impossible of performance ..... We are, therefore, clearly of the opinion that no untoward event or change of circumstances supervened to make the agreement factually or legally impossible of performance so as to attract section 56 of the Contract Act.

M/s. Shanti Vijay & Co. v. Princess Fatima Fouzia, (1980)[64]

Hon'ble Supreme Court *in M/s. Shanti Vijay & Co. v. Princess Fatima Fouzia* has held that:

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63 *Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai,* AIR 1977 SC 1019. followed; AIR 1954 SC 44 and AIR 1972 SC 1756.

64 *M/s. Shanti Vijay & Co. v. Princess Fatima Fouzia,* AIR 1980 SC 17.

In this ruling, reference made to the doctrine of frustration where a contract was held to be frustrated because of ad interim injunction by the court. It has been observed that where the clauses in a contract for sale of certain items of trust property made the passing of property dependent on tender of balance of the price by successful bidders and taking delivery of goods upon such payment and the court, in the meanwhile, restrained the trustees by ad interim injunction from finalizing the sale and even after vacating of the injunction, the High Court ordered restoration of status quo ante before any of such bidders paid the balance of price as stipulated, the contract relating to sale of trust property must be deemed to be frustrated.

Union of India v. Damani & Co.,(1980)[65]

Honb'le Supreme Court in *Union of India v. Damani & Co.* in passing reference to the doctrine of frustration of foreign contract.

> "Most legal systems make provision for the discharge of a contract where, subsequent to its formation, a change of circumstances renders the contract legally or physically impossible of performance."

And indeed, it is part of the statutory law of India. Of course,

> "……. Where a man specifically undertakes an absolute obligation, he cannot claim to be absolved from liability by the fact that his failure to perform the

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65 *Union of India v. Damani & Co.,* AIR 1980 SC 1149.

obligation is due to the occurrence of an event over which he has no control".

***Asstt. Excise Commissioner v. Issac Peter*, (1994)[66]**

Hon'ble Supreme Court in *Asstt. Excise Commissioner v. Issac Peter*,[67] has considered a case of Works Contract between the State and a private contractor in which the State supplied the minimum guaranteed quota of goods to the contractor in compliance with its contractual obligations, but failed to supply the whole of additional quantity of goods demanded by the contractor, which was discretionary under the contract. In that case, section 56 of the Contract Act was sought to be invoked by the Contractor. The Court held that section 56 of the Contract Act, in the circumstances of the case, cannot be invoked.

Ganga Saran v. Santosh Kumar, (1963)[68]

Allahabad High Court has in *Ganga Saran v. Santosh Kumar* observed that: "The word 'impossible' in section 56 of the Contract Act has not been used in th sense of physical or literal impossibility. The sanctity of contract is the foundation of the law of contract and the doctrine of impossibility does not displace that principle, but merely enables the court to enforce it equitably. It releases a party from its obligations to perform a contract where performance has become impossible as a result of events out of the control of that party. However, the plea of impossibility will not be entertained by the court if in spite

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66 *Asstt. Excise Commissioner v. Issac Peter,* (1994) 4 SCC 104.

67 *Asstt. Excise Commissioner v. Issac Peter,* (1994) 4 SCC 104.

68 *Ganga Saran v. Santosh Kumar,* AIR 1963 All 201.

of supervening events, the object and purpose of the parties is not rendered useless and the contract can be performed substantially in accordance with the original intention of the parties though not literally in accordance with the original intention of the parties though not literally in accordance with the language of the agreement. The court will not apply the doctrine of impossibility to assist a party, which does not want to fulfill its obligations under the contract, and relies on literal impossibility to back out of it. The doctrine of impossibility, which is based on equality and common sense, cannot be permitted to become a device for destroying the sanctity of contract.

***Karl Ettlinger & Co. v. Chagandas & Co.,* (1915)[69]**

Hon'ble Bombay High Court in *Karl Ettlinger & Co. v. Chagandas & Co.* has observed, "Section 56 deals with two grounds upon which executory contracts become absolutely void, the first is that the act to be done should, after the contract has been made, become impossible, and the second that the acts necessary to be done in order to carry out the contract should, after the contract has been made and through no fault of the parties to the contract, become unlawful. The latter part of the section deals with case where the acts to be done were at the time the contract was made lawful but a legal prohibition has supervened after the making, but before the performance of the contract and extends to such cases the general principle of law applicable to all contracts and expressed in section 23. Before a contract can be broken on the ground that the acts to be done have become impossible, the courts must be very sure that they are physically impossible. The physical

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69 *Karl Ettlinger & Co. v. Chagandas & Co.,* AIR 1915 Bom 232.

impossibility must go much further than mere difficulty or the need to pay exorbitant prices."

Marshal & Co. v. Naginchand.[70]

In *Marshal & Co. v. Naginchand the Hon'ble* Bombay High Court has held that

"The ratio *decidendi* in all cases of that kind is a rule of common sense rather than law and is referable to this dominating consideration that if the contract is of a kind requiring continuous performance of mutual duties by the parties to it and such duties cannot be so mutually performed during the continuance of a war and further suspension of such mutual rights and obligation for an indefinite period going much beyond merely placing the contract in abeyance, the result, in the eye of the law would be that the original contract is void in as much as taking it upon cessation of hostilities would be something more than renewing it, would, in fact be substituting for it an entirely new contract."

***G.C. Sett v. Madhoram,* (1917)**[71]

Hon'ble Calcutta High Court in the aforesaid landmark decision has held that:

"An executory contract concluded before the outbreak of the war even the alien enemy is merely suspended during the war as regards the right to performance and right of action, and is avoided or dissolved only in certain circumstances,

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70 *Marshal & Co. v. Naginchand*, AIR 1917 Bom 182.
71 *G.C. Sett v. Madhoram,* AIR 1917 Cal 411.

among them, if its performance necessitates intercourse with the enemy during the war:

> ..... Unconditional contracts are, as a general rule, not dissolved by their performance becoming impossible owing to war."

***Kunjilal v. Durga Prasad,* (1920)**[72]

Hon'ble Calcutta High Court in *Kunjilal v. Durga Prasad* has held that:

"The parties will full knowledge of the restrictions imposed by Government as regards the affreightment of goods by rail, and that it was impossible without a priority certificate to get goods sent by rail, entered into a contract for the purchase and forward delivery of linseed, assuming that by the time of the performance of the agreement the normal state of affairs would have returned. When, however, the time for performance of the contract arrived, the restrictions had not been removed and it was impossible for the seller to make delivery. In these circumstances a case was stated for the opinion of the court upon the rights of the buyer and seller under the contract: Held that in the circumstances, the contract had become void before breach and the seller was excused from the performance thereof and that consequently the buyer was not entitled to recover any compensation from the seller."

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[72] *Kunjilal v. Durga Prasad,* AIR 1920 Cal 1021.

***E.A. Gubray v. Ramjusory Golabroy,* (1921)[73]**

In 1921 Hon'ble Calcutta High Court has once again declared its landmark words in the case of *E.A. Gubray v. Ramjusory Golabroy,* "(a) "There must be proof of an embargo on shipping, so as to make applicable the principle of suspension or discharge of a contract is recognized in well-known judicial decisions such as those in *Hadley v. Clarks*,[74] and *Geipel Smith's case*,[75] if the seller has no goods at all ready for shipment, he cannot take advantage of the circumstances that shipment was impossible: that defence should be available, only to a person who, but for the impossibility of shipment by reason of circumstances beyond his control was in fact in a position to fulfill his engagement. Impossibility as an excuse for non-performance must, as a general rule, be a physical or legal impossibility and not merely with reference to the ability and circumstances of the promisor. "Commercial impossibility", that is, extreme and unforeseen cost or difficulty of performance is not excuse for performance. But the rigidity of the rule that an express unconditional contract is not generally dissolved by its performance being or becoming quite impossible in fact, by reason of particular circumstances has been relaxed and exceptions have been engrafted thereon. The doctrine of frustration of adventure has become a gloss on the older theory of impossibility of performance, which it has greatly developed under the guise of reading "implied terms" into contracts. In matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. The Expression

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73 *E.A. Gubray v. Ramjusory Golabroy,* AIR 1921 Cal 305.
74 *Hadley v. Clarks,* (1799) STR 259.
75 *Geipel Smith's case,* (1872) 7 QB 494.

"force majeure" is taken from the Code Napoleon and has a more extensive meaning than "act of God" or *"vis major"* though it may be doubtful whether it includes all "causes you cannot prevent and for which you are not responsible."

***Bhuwalka Bros. Ltd. v. Fatehchand Murlidhar*, (1952)[76]**

Hon'ble Calcutta High Court in *Bhuwalka Bros. Ltd. v. Fatehchand Murlidhar*, has observed that "I venture to think that in the nature of things change is inevitable in all human affairs. When the parties enter into a contract they do so on the basis that a change may happen. If changes which are within the reasonable contemplation of parties at the time of making the contract takes place, the parties cannot get rid of their bargain on the plea that changes have taken place which in fact they did not contemplate; but if the changes that take place are so great as to be beyond the possibility of any human contemplation, the court has certainly to consider whether it would, be just and equitable to enforce the contract, which may result in 'unjust enrichment'."

***Mahadeo Prosad v. Calcutta D. & Co.,* (1961)[77]**

In the landmark decision of *Mahadeo Prosad v. Calcutta D. & Co.,* the Hon'lbe Calcutta High Court has given "a true test of frustration":

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76 *Bhuwalka Bros. Ltd. v. Fatehchand Murlidhar,* AIR 1952 Cal 294.

77 *Mahadeo Prosad v. Calcutta D. & Co.,* AIR 1961 Cal 70.

"In order that the doctrine of frustration as embodied in section 56, Contract Act may apply the following three conditions must be satisfied, viz : -

(a) a valid and subsisting contract between the parties;
(b) there must be some part of the contract yet to be performed;
(c) the contract after it is made become impossible.

If these three conditions are satisfied, then the contract becomes void when the act becomes impossible."

***M/s. Basanti Bastralaya v. River Steam Navigation Co. Ltd.,* (1987)[78]**

The facts of this case is that the defendant a common carrier entered into an agreement to deliver goods to plaintiff by inland navigation. The said contract was exempting defendant from all liabilities due to delay, damage or loss on account of any act of State's enemy during transit. The Vessel and its cargo while in transit, seized and detained by Pakistan Government due to hostility broken out between India and Pakistan. It was held by the Hon'ble Court that the contract of carriage was frustrated due to impossibility of performance.

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78 *M/s. Basanti Bastralaya v. River Steam Navigation Co. Ltd.,* AIR 1987 Cal 271 followed AIR 1961 Cal 70 and Air1975 Cal 92.

***Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai,* (1977)[79]**

In *Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai,* the Hon'ble Apex Court, while construing the expression 'impossible of performance' has held that the parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible.

While delivering this landmark decision the Hon'ble Apex Court has also referred the Halsbury's Laws of England,[80] which states that a contract is not discharged merely because it turn out to be difficult to perform or onerous.

Continental Construction Co. Ltd. v. State of Madhya Pradesh, (1988)[81]

In *Continental Construction Co. Ltd. v. State of Madhya Pradesh,* the Hon'ble Supreme Court while examining its earlier decision in *M/s. Alopi Parshad and Sons Ltd. v. Union of India*,[82] held that a contract is not frustrated merely because the circumstances in which the contract was made underwent a change. It was further held that there is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely on account of an uncontemplated turn of events, which

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79 *Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai,* (1977) 3 SCC 179 : AIR 1977 SC 1019.

80 *Halsbury's Laws of England*, Fourth Edition, Volume 9, para 455.

81 *Continental Construction Co. Ltd. v. State of Madhya Pradesh,* (1988) 3 SCC 82 : AIR 1988 SC 1166 followed AIR 1968 SC 522.

82 *M/s. Alopi Parshad and Sons Ltd. v. Union of India,* AIR 1960 SC 558.

rendered the performance of the contract onerous, like an abnormal rise or fall in prices, a sudden depreciation of currency or unexpected obstacle to the execution of the contract.

***Habibullah v. G.M. Distilleries,* (1956)**[83]

Hon'ble Hyderabad High Court in *Habibullah v. G.M. Distilleries* has observed, "Where the law casts a duty upon a man which through no default of his is unable to perform, he is excused for non-performance. A party to a contract can always guard against unforeseen contingencies by express stipulation but if he voluntarily undertakes an absolute and unconditional obligation, he cannot complain merely because events turned out to his disadvantage. Some times although there may not be a term absolving one of the parties to a contract, from performance of his part of the contract, the court can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted and relieved the party from the obligation to perform the obligation of the contract if the party from the obligation to perform the obligation of the contract if the condition cannot be fulfilled. Mere difficulty or the need to pay abnormal prices cannot exonerate a party from carrying out his part of the contract and such a case would not be governed by section 56 of the Contract Act. Will law allow discharge of a contract, if the act to be performed is rendered illegal or impossible of performance? The answer is that there should be a total impossibility. A clear line of distinction should be drawn between cases of physical or legal impossibility and mere difficulty in carrying out the

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83 *Habibullah v. G.M. Distilleries,* AIR 1956 AP 190.

contract. When the defendant entered into contract for carriage of coal for the plaintiff from one place to another, the plaintiff had agreed to supply the defendant petrol coupons for running a lorry for the carriage of coal. There was however no stipulation that coal was to be carried only by a lorry and not by any other vehicle. In fact the defendant had for some time used bullock carts for carrying the coal. Held, in the circumstances it could not be said that the contract had become impossible of performance merely because the plaintiff had failed to supply petrol coupons for running a lorry. The transport of coal by lorry alone was not the foundation of the contract and it was open to him to have arranged for transport of coal by other means although the transport charges may have been prohibitive."

***Gurdit Singh v. Secy. of State,* (1931)[84]**

Hon'ble Lahore High Court in *Gurdit Singh v. Secy. of State* has observed: "A clear distinction has to be drawn between cases of physical impossibility and mere difficulty in carrying out a contract. Where certain persons enter into a contract to supply ghee to Officer Commanding F. Supply Depot and in spite of the fact that a part of the source of supply is cut off by the action of the Government they elect to make tenders to the Supply Depot, and do not at the time suggest that the contract is void, any option that they might have had of declaring that the contract had come to an end is waived, and are not entitled to a refund of money deposited by then under the terms of contract.

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[84] *Gurdit Singh v. Secy. of State,* AIR 1931 Lah 347.

Firm Bachhraj Amolakchand v. Firm Nandlal Sitaram (1966)[85]

Hon'ble Madhya Pradesh High Court in its landmark decision of *Firm Bachhraj Amolakchand v. Firm Nandlal Sitaram* has held: "When persons enter into a contract the performance of which is dependant on the continued availability of a specific thing and by reason of circumstances beyond the control of the parties, that availability comes to an end, the contract stands dissolved.

..... The commercial or practical purpose of the instant contract was defeated or overthrown by the restrictions and embargoes on export outside the State put by the Government. The foundation of the instant bilticut contract was and must be taken to have been the availability of the wagons. But the non-availability of wagons in the instant case prevented the performance of the contract. The parties had not contemplated the non-availability of wagons when the contract was entered into. The uncertainties of future, no doubt, were there when the contract was made, but when those uncertainties became realities the commercial venture frustrated and excused the performance of the contract for both the parties."

***Narasu v. P.S.V. Iyer,* (1953)**[86]

In *Narasu v. P.S.V. Iyer,* Hon'ble Madras High Court has held: "A contract may be in writing and embody the terms agreed to by the parties and may not obtain a condition excusing non-performance under certain contingencies; but

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85 *Firm Bachhraj Amolakchand v. Firm Nandlal Sitaram,* AIR 1966 MP 145,

86 *Narasu v. P.S.V. Iyer,* AIR 1953 Mad 300.

still in the absence of anything to indicate a contrary intention there is an implied condition that the contract will cease to operate if the basis on which it rests disappears or becomes fundamentally altered.

…….. The change, however, must be of a fundamental and sweeping character, which kills the contract itself and not merely one of a temporary nature, which leaves the contract alive and capable of being performed at a future date. That question is a question of fact to be determined on a consideration of all the fact……..

***G. A. Galia Kotwala and Co. Ltd. v. K.R.L. Narasimhan and Brothers* (1954)**[87]

In the immediate next year the Hon'ble Madras High Court has once again confirmed its own previous view in *G. A. Galia Kotwala and Co. Ltd. v. K.R.L. Narasimhan and Brothers* and observed the following:

"In commercial contracts, where the contract becomes impossible of performance by reason of a state of war or by an act of the executive Government, or the contract which would otherwise be expected to be ordinarily performed, is delayed by reason of certain regulations imposed by the Government making the performance of such contract dependent upon the grant of licence or permit, the parties need not wait for an indefinite period in the hope of the relaxing of the control orders or the granting of licence and permit……..

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87 *G. A. Galia Kotwala and Co. Ltd. v. K.R.L. Narasimhan and Brothers*

.....The doctrine of frustration is not a rule of positive or substantive law, but a rule which is made applicable to interpretation of contracts to find out whether the contract has become frustrated, that it has either become impossible of performance, or though possible of performance, has become useless and ineffective.

***Sri Mahalingaswami Devasthanam v. A.T. Sambanda Mudaliar,* (1962)[88]**

After considerable long time also, the Hon'ble Madras High Court consistently followed the previous views even in *Sri Mahalingaswami Devasthanam v. A.T. Sambanda Mudaliar,* and held that an absolute contract involving unconditional terms by way of obligation undertaken by one of the contracting parties may, if enforced, result in hardship, prejudice, loss or detriment to the promisor. But, surely, the loss or damage suffered by the promisor in the course of fulfilling the obligations cannot absolve him from liability in the least degree. The mere fact that a contract has been rendered more onerous does not of itself rise to frustration.

***S.A.P. Devasthanam v. Sabapathi Pillai* (1962)[89]**

Aforesaid decisions are once again followed in *S.A.P. Devasthanam v. Sabapathi Pillai*. It has been observed by the Hon'ble Madras High Court that before applying the doctrine of frustration, the first duty of the court is to ascertain the facts forming the basis of the contract and to see how far the change in the circumstances is such as

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88 *Sri Mahalingaswami Devasthanam v. A.T. Sambanda Mudaliar,* AIR 1962 Mad 122.

89 *S.A.P. Devasthanam v. Sabapathi Pillai,* AIR 1962 Mad 132.

would remove the very foundation of the contract itself. The court must in fact determine whether the circumstances did exist and if so, whether they are sufficient to hold that the parties are absolved from their obligations under the contract. It is the essence of the doctrine that the event, which causes frustration, must have occurred without the fault of either party. Therefore, the court ought to see whether it is a case of self-induced frustration in which case there will be no breach at all. Held on facts that the theory of frustration could not be applied in the case as there was no destruction of the specific thing necessary for the performance of the contract; nor had the performance become impossible by reason of the incapacity of a party on account of the promulgation of Ordinance IV of 1952 or of the Madras Act 14 of 1952, as the defendants were already aware of the promulgation of the Ordinance when they entered into the agreement. Plea of frustration in such a case should fail.

***Surpat Singh v. Sheo Prasad* (1945)[90]**

In *Surpat Singh v. Sheo Prasad*, Hon'ble Patna High Court has observed that the doctrine of frustration is that, when the performance or further performance of a contract has been rendered impossible or has been indefinitely postponed in consequence of the happening of an event which was not and could not have been contemplated by the parties to the contract when they made it, a court will consider what, as fair and reasonable men, the parties would have agreed upon if they had in fact foreseen and provided for the particular event, and if, in its opinion, they would have decided that the contract should be regarded as

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90 *Surpat Singh v. Sheo Prasad,* AIR 1945 Pat 300.

at an end, will discharge the party who would otherwise be liable to pay damages for non-performance of the contract. Before the doctrine of frustration can be invoked, it must be shown that the event, which has produced frustration, was an event, which the parties to the contract did not foresee and could not, with a reasonable diligence, have foreseen. When it has not become impossible for the patnidar to discharge his obligation under the lease, but merely burdensome to him to do so, the doctrine can have no application whatever.

A.F. Ferguson & Co. v. Lalit Mohan Ghosh (1954)[91]

In *A.F. Ferguson & Co. v. Lalit Mohan Ghosh*, the effect of frustration has been considered by Hon'ble Patna High Court by observing that where due to the outbreak of war on 3rd September, 1939, the performance of the contract by the insured by making payments of the premium to the enemy Insurance Co. with whom the insured was insured became impossible and illegal under rule 104 of the Defence of India Rules, the contract became frustrated and void. Section 56 of the Contract Act is perfectly clear on the point, and if the performance of the contract after the outbreak of war became impossible or unlawful, the contract of insurance became void.....

.....If and when there is frustration, the dissolution of the contract occurs automatically. It does not depend, as does rescission of a contract, on the ground of repudiation or breach, or on the choice of either party. It depends on the effect of what has actually happened on the possibility of performing the contract. Therefore, the moment the war

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91 *A.F. Ferguson & Co. v. Lalit Mohan Ghosh,* AIR 1954 Pat 596.

broke out, any further performance of the contract became unlawful and the result was that the contract stood dissolved on the very date the declaration of war was made absolving both the parties from its performance.

***Suresh Narain v. Akhauri,* (1957)[92]**

Even in *Suresh Narain v. Akhauri,* the Hon'ble Patna High Court has followed the same legacy of the views taken by its predecessor. The plaintiff had deposited a sum of money in Jehanabad branch of bank, which had its head office at Dacca. The branch at Jehanabad was closed in September, 1947 because of the political partition of India and payments were not made to the depositors at that branch from that date. The head office of the bank being located at Dacca within the boundaries of Pakistan, communication between India and Pakistan was dangerous and difficult. The defendant who had give a personal undertaking that he would be personally liable for any loss that the plaintiff might sustain, argued that the partition of India and Pakistan was not an event in the contemplation of the parties at the time of the contract of guarantee was entered into and therefore the contract had become impossible of performance and therefore section 56 applied to the case. Held, that in the circumstances, the doctrine of frustration did not apply and the defendant could not be absolved from performance under section 56.

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92 *Suresh Narain v. Akhauri,* AIR 1957 Pat 256.

***H.R. & K. Industries v. State of Rajasthan,* (1964)[93]**

In *H.R. & K. Industries v. State of Rajasthan,* the Hon'ble Rajasthan High Court has observed: "The doctrine of frustration is embodied in section 56 of the Contract Act. The essential principle upon which it is based is the impossibility; or rather the impracticability in law or fact of the performance of a contract brought about by an unforeseen and unforeseeable sweeping change in the circumstances intervening after the contract was made. In other words, while the contract was properly entered into in the context of certain circumstances which existed at the time it fell to be made, the situation becomes so radically changed subsequently that the very foundation which subsisted underneath the contract as it gets shaken, nay, the change of circumstances is so fundamental that it strikes at the very root of the contract then the principle of frustration steps in and the parties are excused from or relieved of the responsibility of performing the contract which otherwise lay upon them."

***T.V. Kochuvareed v. P. Mariappa Gounder* (1954)[94]**

The aforesaid question has also been considered in *T.V. Kochuvareed v. P. Mariappa Gounder*, where the court observed: "The doctrine of frustration known to the English Law has been statutorily recognized under the Indian Law, in this section (section 56). For the application of the doctrine, it is essential to ascertain the facts assumed by

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93 *H.R. & K. Industries v. State of Rajasthan,* AIR 1964 Raj 205. Relied AIR 1954 SC 44 and AIR 1960 Raj 138.

94 *T.V. Kochuvareed v. P. Mariappa Gounder,* AIR 1954 Travancore Cochin 10.

the parties as forming the fundamental basis of their contract and then to see how far the subsequent development have resulted in the determination of the very basis of the contract, thereby rendering its performance impossible.

***Union of India v. Dass* (1955)[95]**

In *Union of India v. Dass*, the Hon'ble Pepsu High Court has dealt with the most sensitive issue in the history of frustration as far as Indian Law of Frustration is concerned.

On 11-8-1947, it was unquestionably common knowledge that India was being divided into two Dominions on 14-8-1947. Only three days before that date the railway accepted the consignment at the Lahore railway station for carriage to Nabha railway station. There was wholesale evacuation of non-Muslim population beyond Lahore and passenger train service was anything but satisfactory and there could be no question of there being normal goods train service in those days. The disturbances were already on, in Lahore on 11th August and the railway administration could not possibly ignore what was going on not only around and in the railway station. The railway administrate was, therefore, aware of the state of circumstances in which it accepted the consignment and the disturbances had already started when the accepted was made. The consignment never reached Nabha. In a suit against the Railway for loss, it was contended that the doctrine could not be performed, the performance having become impossible due to frustration and that the contract had thus become void.

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95 *Union of India v. Dass,* AIR 1955 Pepsu 51.

Held that it did not lie with the defendant Railway to say that what happened was something that could not be foreseen by reasonable men. The tempo that the disturbances were to reach was too apparent by 11th August and the defendant could not say that what happened could not be foreseen and, therefore, an implied term in the contract between the parties must be read that the state of things, i.e., the peaceful atmosphere necessary for efficient running of the railways, the continuance of which they expected at the time of the making of the contract, ceased to exist because of the disturbances thus rendering the purpose of the contract impossible and that the supervening events could not be contemplated or foreseen by the parties. Thus there was no substance in the contention of the defendant.

It is further held that the fact that the goods had gone to Karachi and the fact that they would not leave Karachi for India without an export permit also did not help the defendant. When the goods were accepted for consignment there was no such law and no legal obstruction in the carriage of the goods. Even if it be taken that such a law requiring permit came into force on the day Pakistan came into being, still that would not provide an effective defence to the defendant because when the defendant accepted the goods, there was no such legal, impediment, and sine the date of partition was known at that time, such a contingency could not be said to be outside the contemplation and foresight of the parties. Therefore, this argument did not bring the case within the scope of doctrine of frustration.

In this ruling notice is taken of AIR 1951 Sim 189 and AIR 1952 Pun 34.

Partition of the country was undoubtedly an event the impact of which on the contract between the parties was neither foreseen nor foreseeable. Travel and trade between the two Dominions became impracticable and hazardous. The times were so abnormal that normal movements of men and material was not possible. It can well be argued that if the contract envisaged such movement of men and materials, the contract was impossible of performance within the meaning of section 56 of the Contract Act but if the contract could be performed without such movement, the plea of frustration may not be sustainable.

Hari Chand Madan Gopal. V. State of Punjab, (1973)[96]

Another aspect of the impact of the partition on contracts with undivided provinces was whether such contracts could be legally enforced by the divided province after the partition? In *Hari Chand Madan Gopal. V. State of Punjab,* it was held by the Hon'ble Supreme Court that if a contract was entered into with undivided Punjab, could East Punjab enforce such a contract against a third party after the partition. To meet this legal difficulty a provision was made by issue of Governor's orders which had the legal effect of bifurcating a single and indivisible contract with Punjab into two separate contracts enforceable wither by West Punjab or East Punjab depending upon the subject-matter. If the subject matters pertained to East Punjab such a contract was enforceable by East Punjab. A plea taken in such a case that, as the assets of undivided Punjab were divided between West Punjab and East Punjab in the proportion of 60: 40 East Punjab could only claim from the

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96 *Hari Chand Madan Gopal. V. State of Punjab,* AIR 1973 SC 381.

third party 40 per cent of the total dues on the foot of that that contract. This plea was repelled by the Supreme Court holding that 60 : 40 was for the purpose of financial adjustment of the assets between the two provinces West Punjab and East Punjab and did not affect the contractual liability of a third party. Well it has been said that drastic wrongs require drastic remedies and abnormal situations call for handling with care.

- **Connotation of the word "Impossible" considered.**

It has now been generally accepted as correct that the doctrine of frustration of contract would apply to cases where the very foundation of a contract disappears by virtue of circumstances coming into existence, which were not within the contemplation of the parties to the contract. "The word 'impossible' should be constructed in a liberal sense so as to embrace within its purview act which become impracticable or extremely hazardous and cannot be said to have been used, in a physical or literal sense. It is sufficient for the act to be impossible that it becomes impracticable or useless from the view of the object and purpose, which the parties had in view. In the present case, it is clear that the plaintiffs were to derive benefit from the produce of the lands and this object was totally upset by the change of circumstances coming into existence due to the creation of the two Dominions of India and Pakistan".[97]

It is settled law that before the court applies the principle that the contract has become impossible of performance, the first duty is to ascertain the facts forming the basis of

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[97] *Hari Singh v. Dewani Vidyawati,* AIR 1960 J & K 91.

the contract and see how far the change in the circumstances is such as to remove the very foundation of the contract itself. The court must as a fact determine whether the circumstances did exist and if so whether they are sufficient to hold that the parties are absolved from their obligation under the contract. It is the essence of the doctrine that the event, which causes frustration, must have occurred without the fault of either party. Therefore the court ought to see whether it is a case of self-induced frustration in which case there could be no defence at all".[98]

In *Gundayya v. Subayya,*[99] it was held: "The law does not apply an absolute obligation to do that which the law forbids, and the reasonable view to take of the contract would be that the seller agreed to supply the promised number of bags of rice if, after using his best endeavour he was able to secure the necessary number of wagons. The obligation to perform the contract was not therefore absolute, but impliedly conditional."

To attract the doctrine of frustration of contract the performance of the contract must become absolutely impossible due to the supervening event, legislative or otherwise. Where in spite of intervention of events subsequent to the making of the agreements which were not in contemplation of the parties and which could not be foreseen with reasonable diligence, the contract still be performed in substance and it cannot be said that the contract has become impossible of performance within the meaning of section 56 of the Act. In the case of *Ramkumar*

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98 *D.R. Mehta v. Tin Plate Dealers Association Ltd.,* AIR 1965 Mad 400.

99 *Gundayya v. Subayya,* AIR 1927 Mad 89.

v. P.C. Roy & Co. (India) Ltd.,[100] the principle of frustration came up for consideration of the court in the context of the facts that certain goods were contracted to be transshipped. Their Lordship lay down:

"The main object of the contract was the transshipment of the goods from Bihar to Bengal by railway and in my opinion having regard to the events that have happened the basis of the contract has been overthrown. In the absence of express intention of the parties I have to determine what is just and reasonable in view of the non-availability of wagons for transport and the difficulties created by the restrictions or emergency orders. It may be now accepted as settled law that when people enter into a contract which is dependent for its performance on the continued availability of a specific thing and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is dissolved. According to Lord Wright the expression 'frustration of the contract' is an elliptical expression. The fuller and more accurate expression is 'frustration of the adventure or the commercial or practical purpose of this contract'. In my view, the commercial or practical purpose of this contract was defeated or overthrown by the refusal on the part of the Government to issue permit and by the non-availability of the transport facilities and the restrictions and embargoes put by the Government and ultimately by requisition of the stock of the plaintiff. The real object of the contract as contemplated by the parties was the purchase or employment of the goods for a particular purpose and therefore the doctrine of frustration can be imported and, if

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100 *Ramkumar v. P.C. Roy & Co. (India) Ltd.,* AIR 1952 Cal 335.

necessary, the requisite terms can be implied." Test of impossibility is whether it was practically impossible for party to perform the contract within specific time.

In *Ganga Singh v. Santosh Kumar,*[101] it was held: The word 'impossible' in section 56 of the Contract Act has not been used in the sense of physical or literal impossibility. The sanctity of contract is the foundation of the law of contract and the doctrine of impossibility does not displace that principle, but merely enables the court to enforce it equitably. It releases a party from its obligations to perform a contract where performance has become impossible as a result of events out of the control of that party. However, the plea of impossibility will not be entertained by the Court if, in spite of supervening events, the object and purpose of the parties is not rendered useless and the contract can be performed substantially in accordance with the original intention of the parties though not literally in accordance with the language of the agreement. The court will not apply the doctrine of impossibility to assist a party, which does not want to fulfill its obligations under the contract, and relies on literal impossibility to back out of it. The doctrine of impossibility, which is based on equity and common sense, cannot be permitted to become a device for destroying the sanctity of contract.

Doctrine of 'frustration of venture' is based not upon existence of any actual impossibility in fact but upon existence in it circumstances of the case, of an implied condition, which must be absolutely necessary to give effect to the transaction which parties must have intended. Where at the time contract was entered into there were in fact

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101 *Ganga Singh v. Santosh Kumar,* AIR 1963 All 201.

some uncertainties and subsequently those uncertainties become realities, the commercial venture gets frustrated and both parties are excused from performing the contract.

In commercial contracts, where the contract becomes impossible of performance by reason of a state of war or by an act of the executive Government, or the contract which would otherwise be expected to be ordinarily performed, is delayed by reason of certain regulations imposed by the Government making the performance of such contract dependent upon the grant of licence or permit, the parties need not wait for an indefinite period in the hope of relaxing of the control orders or the grant of licence and permit.

The doctrine of frustration is applicable only where the frustrating event is outside the contemplation of the contracting parties. It is not applicable to an express contract to repay money in case of supervening impossibility of performance of a major obligation.

“The expression ‘frustration’ is now generally used to denote cases of subsequent physical or legal impossibility as well as cases of frustration of the commercial venture.”

If the promisor knew the impossibility of performance at the time when the contract was made but was not known to the promise, the former will be taken to have made an absolute promise. It frequently happens that a contract is silent as to the position of the parties in the event of performance becoming literally impossible or only possible in a very different way from that originally contemplated. In such cases, the law excuses further performance under the doctrine of impossibility of frustration.

The doctrine of frustration has been variously stated to depend on an implied condition, the disappearance of the foundation of the contract, the intervention of the law to impose a just and reasonable solution, or the fact of a radical change in the character of the obligation; but the last view is now the predominant one.

A party will not escape liability for non-performance by showing an impossibility referable solely to his individual ability or circumstances or that he find the contract unduly difficult or onerous to perform.

Whatever the alleged source of frustration, a contract is not discharged under this doctrine merely because it turns out to be difficult to perform or onerous. Thus the parties will not generally be released from their bargain on account of rises or falls in price, depreciation of currency or unexpected obstacles to the execution of the contract, for these are ordinary risk of business.[102]

- **Can Inflation be accepted as a plea for frustration of contract.**

The contract normally stipulated obligation on the part of one party to render services or to supply stores in return for the obligation on the other party to pay for the same. Payment is fixed considering the price for such stores or services at an estimate made at the time of making the contract taking into consideration normal fluctuations of the market and the money in which payment is to be made.

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[102] Halsburys' Laws of England, (1974), 4th edition, Vol. 9, Para 442.

There was a time when money was stable when it was hitched to gold standard and one could predict with certainty that there would be no violent fluctuations in the value of money between the date of entering into the contract and the date when payment is due or actually paid. But gone are those days of stability and predictability. Money is no longer hitched to gold standard. It fluctuates violently and frequently if not continuously and nobody can predict with any amount of certainty or even approximation, the fluctuations, which would intervene between the date of entering into the contract and the date of receiving payment. Inflation has come to stay. Initially, it was considered to be a temporary phenomenon, which would disappear in course of time when the market settles down. Similarly, devaluation was considered to be an extraordinary phenomenon to be considered as an exception and not a factor to be taken into consideration in commercial transactions. But, now a day, both inflation and devaluation, which are in fact twin aspects of the same process, are factors, which cannot be ignored, in commercial transactions. Due to inflation prices have increased and are increasing, the situation having been aggravated by precipitate hike in petroleum prices. Rupee was devalued on 6-6-1966 and has been revalued and devalued number of times. Similarly, the currencies of other countries have been repeatedly revalued. Inflation is a worldwide phenomena and all attempts to eliminate it have failed. It is only the percentage of the increase, which is sought to be kep under control. To an extent, this phenomena is the consequence of the change in the role of the State in modern times. The State is no longer concerned with law and order and taxation alone but plays a vital role in the economic field because of control and distribution of scare materials and fixation of price of

essential commodities like steel, cement, etc. Cost of living index has been steadily rising. It got a jump in 1973 – 74 with the hike in petroleum prices by approximately 250%. These factors have introduced an element of uncertainty in commercial transactions and the question arises whether inflation or devaluation of the currency can be pleaded as frustration of the contract.

The impact of inflation on the performance of the contract vis-à-vis the doctrine of frustration has been judicially considered in U.K. in following words:[103]

"Lord Denning MR reached an interesting and controversial decision in Staffordshire Area *Health Authority v. South Staffordshire Waterworks Co.*[104] The facts of which have already been stated. In this case Lord Denning MR held that the contract had been frustrated by inflation 'outside the realm of their speculation altogether, or of any reasonable person sitting in their chairs'. With respect, however, this view; which was not concurred in by the other members of the court is either wrong or involves a massive change in the law as previously understood. There are thousands if not millions, of contracts potentially within the scope of this principle, for example, long leases for 99 years or more at fixed ground rents or long term policies of life insurance. Furthermore, the facts of the case would not appear to satisfy Lord Denning MR's own test since in 1929 hyper-inflation was well-known phenomenon which had recently devastated the economics of several European countries."

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103 Cheshire, Fifoot and Fumston's, 10th edition, p. 520, *Law of Contract.*

104 *Health Authority v. South Staffordshire Waterworks Co.,* (1978) 2 All ER 769 : (1978) 1 WLR 1387.

"Where the loss is a money loss, the fact that a change in the value of money is involved is unmasked: it is no longer latent as in the cases of loss of property and of services. It is submitted that there is a good argument for basing the award to the plaintiff on the value of the money at the time of breach in the case of contract. This fits the general rule of damages that they are to be assessed as at the date of when wrong rather than the date of trial and judgment, is consistent with the established rule where foreign currency is involved, and provides for the plaintiff a hedge against the inflationary dangers of the law's delays to which he ought to be entitled, always provided that he is not responsible himself for culpable delay in suing.

Lord Wilberforce found that there had and the key to such consideration was undoubtedly the monetary uncertainties which have afflicted the world in the 1970's. He said:

"The situation as regards currency stability has substantially changed ever since 1961. Instead of the main world currencies being fixed and fairly stable in value, subject to the risk of periodic re – or devaluations, many of them are now 'floating', i.e., they have no fixed exchange value even from day-to-day. This is true of sterling. This means that instead of a situation in which changes of relative value occurred between the 'breach date' and the date of judgment or payment being the exception, so that a rule, which did not provide for this case could be generally fair, this situation is now the rule. So the search for a formula to deal with it becomes urgent in the interest of justice."[105]

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[105] (1976) AC 436.

Inflation is a supervening circumstance, over which parties have no control, the causation of which is not attributable to the parties but it is not just a visiting misfortune like floods, cyclone, earthquake, fire, etc., which, from its very nature, is temporary. Inflation is a class by itself; it is a misfortune, which has come to stay. It cannot be entirely eliminated but it can only be contained. The utmost that can be achieved is that its intensity may be diminished from double digits to single digit. It is a phenomenon, which cannot be said to be unforeseen. It is for the parties to provide for it in the contract. Not having done so, can it be said that they intended that the loss will be lie where it falls or that they leave it to the lawyers to sort it out. The question arises "Will law take care of such a situation by coming to the rescue of the suffering party by holding that the contract is frustrated?" If there is run-away-inflation, the burden of the contract on the promissory will be so heavy that justice demands that he be relieved as held by the British court in *Straffordshire* case[106] or as contemplated by American law in Restatement of Law, article 454 which contemplates increase of expense as a justifying cause for frustration. Time may come when Supreme Court of India may be persuaded to take this view though the present view which has been taken in *Alopi Parshad's* case[107], is that increase in expenditure of fluctuation in currency will not affect the contractual obligation following the British Rulings in Joseph Constantine Steam Ship case and British Movietonews case. Though the British courts have moved forward as in Straffordshire case, the Indian Courts have

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106 *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.,* (1978) 3 All ER 769 : (1978) 1 WLR 1387.

107 *M/s. Alopi Parshad and Sons Ltd. v. Union of India,* AIR 1960 SC 588.

remained static. It may be safely predicted that the hope expressed by Lord Wilberfore in the case 1976 AC 463 that search for a just solution for such a situation is called for, will eventually be realized. Perhaps a formula will be evolved that if the burden of the contract increases manifold due to causes not attributable to any party, the parties may be relieved but not when there are marginal increases. What is marginal increase and what quantum jump may qualify as manifold increase will be a knotty problem for the courts to settle, which may well be lawyer's delight and judge's despair.

Contract is an arrangement arrived at by the parties for sharing the risk and the bargain contained therein is arrived at by maintaining equilibrium. This equilibrium which is of the essence of the contract is disturbed by inflation and this disturbance goes to the root of the contract as what the parties assumed as the basis of the contract no longer exists. The result would be that the contract as now is, becomes radically different from the contract as it was. Such a situation would attract the doctrine of frustration. At any rate it would qualify as a justifying cause of non-performance, which will not amount to breach.

Justice, equity and fair-play demand that the aggrieved party must be paid in terms of the real value of money (and not the nominal value) with reference to the due date; if we have to satisfy the requirement of the principle of restitution, i.e., the aggrieved party to be placed in the same position as it would have been if the other party had performed the contract. No doubt it is not easy to find a formula to satisfy the requirement of this principle but a beginning has to be made till a satisfactory formula is drawn and accepted. Consumer index may be a guide for the

purpose though the items it includes, are limited and may not fairly represent the real value of money as a whole on a particular date but till such time when the required data is available reflecting the fluctuations of money from time to time in the domestic market, (apart from the exchange rate in the international market). This may be the data to work upon. To be content with payment in terms of nominal money is by no means a satisfactory solution. It may well be that in the absence of a satisfactory formula, a plea of frustration can be raised as the fluctuation are certainly events beyond the control the parties; not in contemplation of the parties at the time of entering into the contract and events which destroy the foundation of the contract and make the performance of the contract radically different.

- **Endeavour to list frustrating events.**

While it may be possible to list the class of contracts in respect of which frustrating events call for consideration, it may not be possible to compile a complete catalogue of frustrating events, as the categories of such events are not closed and therefore such a list can only be illustrative but not exhaustive.

- **Class of contracts.**

(1) Contract for sale of goods.
(2) Contract for carriage of goods.
(3) Charter-parties.
(4) Personal contracts.
(5) Building contracts.
(6) Leases.
(7) Contracts for sale of land.

- **List of frustrating events.**

1. Destruction of the subject matter of the contract, e.g., by fire or other causes.
2. Requisitioning of the subject matter of the contract by the Government.
3. Delay, sufficiently long to have the effect of frustrating the commercial adventure embodied in the contract.
4. Seizure of the ship by foreign Government.
5. Explosion causing the disabling of the ship.
6. Incapacity or death of the promisor under a personal contract.

While the above list contemplates supervening events have adverse effect on the performance of the contract conceivably there can be a case where supervening events may have beneficial effect on the performance of the contract. Such a case would be a case of operation of the doctrine of frustration in reverse. When the parties contract not on the continuance but on a change in the circumstances on the assumption that despite the existing adverse state of affairs the normal state of affairs beneficial to the performance would return by the time performance is due, as the existing state of affairs were abnormal and temporary, such a contract is not void *ab initio*. But in such a case if the expected normal state of affairs does not materialize the contract would be frustrated. The reason being throwing of the risk on one of the parties in such a case would be doing something, which the other party himself did not intend. An illustration of such a case can be entering into a contract for supply of goods from the place of manufacture to its destination, which was banned by the

then prevalent war restrictions but as the armistice were signed it was only an intelligent anticipation that war restrictions would be lifted by the due date but due to inevitable departmental delays such expectations did not materialize by the due date, the contract would be frustrated.

Partial frustration can take place when there is destruction of small separable parts of the subject matter of the contract leaving the functional integrity of such subject matter in tact. Decision in any given case whether there is partial frustration or not would depend on the facts of that case.

While a supervening event may be accepted as frustrating or rejected as non-frustrating in between the two lays a grey area.

- **Situation though Short of Frustration may qualify as justifiable excuse for non-performance.**

Law is settled that a supervening event may make the contract more onerous or entail extra expenditure but that by itself would not frustrate the contract unless there is change in the significance of the obligation or the contract becomes radically different or the foundation disappears. The problem, which presents itself, is where do you draw the line that the supervening event frustrates the contract or makes it merely onerous, falling short of frustration? What are the guidelines on the point? It has been said that in some cases the supervening event may not qualify as frustration and yet it may excuse non-performance. This contemplates that some supervening even failing to qualify as frustration may be justification or an excuse for non-

performance while other supervening event may also fall short of justification and excuse for non-performance. Where do you draw the line between justifiable excuse for non-performance and untenable contention for the same? What are the guidelines to be followed in separating one from the other? Somehow or the other, this interesting and important point has not received the consideration which it deserves. Both the courts and the text book writers have not considered this aspect of the matter in any depth except perhaps one writer, Trietel in Frustration and Force Majeure,[108] says referring to events qualifying as justifiable excuses for non-performance though falling short of frustrating events. "The preceding discussion concerns the borderline between strict liability and discharge; but is also necessary to refer to the relationship between the doctrine of discharge and cases in which contractual liability is based on fault. These are cases in which a party who has undertaken to perform service or to achieve some result is not liable if he has exercised reasonable care in rendering the service, or if he has used due diligence to bring about the result. If that party complies with that standard, but the result specified or expected by the other party is not achieved, then former party is not in breach. .....If the party who was required by the contract to make the reasonable efforts does make them and nevertheless fails to obtain the requisite consent, he is under no liability. But the reason for this is not that the supervening event has discharged him from this duty of diligence; it is rather that he has performed that duty."

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[108] Trietel, (1994), p. 5, *Frustration and Force Majeure*.

Cheshire, Fifoot and Fumston's Law of Contract,[109] has stated that unusually failure to perform will amount to breach. This is true but it is important to recognize that in certain circumstances failure to perform is excusable. In some cases unforeseeable events, although not bringing the contract to an end, may provide an excuse for non-performance.

Calcutta High Court in *Ramkumar v. P.C. Roy & Co.,*[110] have observed that "Frustration is a developing concept; like negligence, its categories are never closed but are as wide as the categories of human conduct. Its effect is immediate, automatic; it guillotines a contract and the contract, without the option of either party – accrued rights subsisting – is dissolved. If the parties later purport to act under it they are really making a new contract. The court supplying enlightened common sense to do justice, decided whether the contract is at an end."

Orissa High Court has also considered this question in *Utkal Automobiles (P) Ltd. v. B.P. Roy*,[111] "In a case of contract for supply of trucks on priority basis, no supply of truck was made by manufacturer to defendant (dealer) during relevant period. It was held that there was no breach of contract on part of the defendant".

Patna High Court has also observed in *Firm Rampratap v. S.S. Works Ltd.*,[112] "Where gunny bags manufactured by a

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109 Cheshire, Fifoot and Fumston, 11th edition, p. 516, *Law of Contract*,

110 *Ramkumar v. P.C. Roy & Co.,* AIR 1952 Cal 335.

111 *Utkal Automobiles (P) Ltd. v. B.P. Roy,* AIR 1976 Ori 15.

112 *Firm Rampratap v. S.S. Works Ltd.,* AIR 1964 Pat 250. ILR 1952(2) Cal 458., AIR 1923 PC 54(2) and AIR 1941 Pat 429, Relied on.

particular mill were agreed to be supplied during a specified period and the agreement was entered into with the full knowledge of the fact that the mills were closed during the relevant period due to labour strike, the failure to supply gunny bags as per agreement cannot be attributed to the closure of the mills and the doctrine of frustration cannot be made applicable to such a case even by implication.

Commercial contracts are entered into with the object of performing them, but the parties do not always succeed in doing so and are sometimes thwarted by events beyond their control, which supervene during the performance. It is not unknown that political, economic and social upheavals overtake the performance of commercial contracts. The result is that the contract may be held to be frustrated as a consequence of such supervening events. In such a case while one party may seek to enforce the contract or claim damages for breach, the other may advance the defence of frustration and claim immunity from the liability for damages. Litigation is both expensive and time-consuming and the commercial community being allergic to such a situation has taken to drafting a built-in clause in the contract providing for the consequences of such contingencies, which clause has been conveniently called *force majeure* clause. Parties may foresee a future supervening event, which may make the performance of the contract impossible or may affect the foundation of the contract. Having foreseen such an event parties may make a provision in the contract itself regarding the consequences of such an event. They may agree that in such an eventuality either the contract will stand terminated or provide that the party affected may have option of terminating it by giving notice to the other party or that the contract will not be terminated but extended for the purpose

of performance when the effect of such an eventuality is lifted or varied so as to make the performance of the contract possible despite the delay or the change in the mode, method or manner of performance. Such a clause is termed as a *force majeure* clause for sake of convenience. *Force majeure* clause is not synonymous with vise major. *Force majeure* is a term of wider import. While vise major may refer to acts of God, *force majeure* may refer to acts of man as well, etc., etc. The intention of stipulation of *force majeure* clause into the contract is to save the performing party from the consequences of an event over which he has no control. Such a clause would stipulate what would be effect of the catalogued contingencies, normally allowing for the suspension of performance for a reasonable period of time coupled with the right to terminate the contract if the consequent delay persists beyond that reasonable limit. The catalogued contingencies generally are the events, which are beyond the control of the parties.

The expression *force majeure* has been judicially defined to cover "all circumstances beyond the will of man which it is not in his power to control". A party who has no *force majeure* protection can find himself in the position of not being able to fulfill his contract, and in action against him for breach can fine that the court rejects his plea of frustration. He will then have to pay damages to the plaintiff.

Justice Hidayatullah, in *M/s. D. Gobindram v. M/s. Shamji K. & Co.,*[113] while interpreting the expression "usual *force majeure* clause", have quoted with approval the English

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113 *M/s. D. Gobindram v. M/s. Shamji K. & Co.,* AIR 1961 SC 1285.

ruling of McCardie, J., in *Lebeaupin v. Crispin*,[114] and observed: "The expression *'force majeure'* is not a mere French version of the Latin expression *'vis major'*. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in *'force majeure'*. Judges have agreed that strikes, breakdown of machinery, which though normally not included in *'vis major'* are included in *'force majeure'*. An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to *'force majeure'*, the intention is to save the performing party from the consequences of anything over which has to control. This is the widest meaning that can be given to *'force majeure'* and even if this be the meaning, it is obvious that the condition about *'force majeure'* in the agreement was not vague. The use of the word 'usual' makes all the difference and the meaning of the condition may be made certain by evidence about a *force majeure* clause, which was in contemplation of parties."

In *Serajuddin v. State of Orissa,*[115] the Hon'ble Orissa High Court has followed the view taken in *M/s. D. Gobindram v. M/s. Shamji K. & Co.*[116] In the above ruling, it has been observed that: "The expression *'force majeure'* is not a mere French version of the Latin expression *'vis major'*, and strikes, break down of machinery and such things which, though normally not included in *'vis major'*, are included in *'force majeure'*. Where reference is made to *'force majeure',* the intention is to save the performing party form the

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114 *Lebeaupin v. Crispin*, (1920) 2 KB 714.

115 *Serajuddin v. State of Orissa,* AIR 1961 SC 1285. (1920) 2 KB 714. Referred.

116 *M/s. D. Gobindram v. M/s. Shamji K. & Co.,* AIR 1961 SC 1285.

consequences of anything of the nature stated above or over which he has no control.

'Further, the *'force majeure'* clause should be construed with a close attention to words which precede or follow it, and with due regard to the nature and the general terms of the contract. Therefore, the words 'any other happening' in such a clause must be given *ejusdem generic* construction so as to engulf within its fold only such happenings and eventualities which are of the nature and type illustrated in the same clause with close attention to the nature and terms of the contract and would not reasonably be within the power and control of the party."

Calcutta High Court in *E.A. Gubray v. Ramjusroy Golabroy,*[117], commenting on the expression *'force majeure',* has observed: "The expression *'force majeure'* is taken from the Code Napoleon and has a more extensive meaning than 'act of God' or *'vis major'*, though it may be doubtful whether it includes all 'causes you cannot prevent and for which you are not responsible'.

- ***CARDINAL DIFFERENCE BETWEEN ENGLISH LAW OF FRUSTRATION AND INDIAN LAW OF FRUSTRATION.***

The cardinal difference between English Law of Frustration and Indian Law of Frustration is that while the former is common law, the latter is statute law. English Law being a judge-made law has lacked in uniformity and certainty but has flexibility while the Indian Law being codified law can claim uniformity and certainty but because of its rigidity it is

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117 *E.A. Gubray v. Ramjusroy Golabroy,* AIR 1921 Cal 305.

frozen at the point of time when it was enacted in 1872. While the English Law has moved with the times, Indian Law has remained static.

English Law passed through various stages of development and the propositions propounded in various judicial decisions were not uniform. In some the Doctrine of Frustration was held to be a device by which the rule as to absolute contract is reconciled with a special exception which justice demands *(Hirji Mulji's case)*.[118] When an unexpected event or change of circumstances occurred the possibility of which the parties did not contemplate the meaning of the contract is taken to be not what the parties actually intended but what they as fair and reasonable men would presumably have intended and agreed upon if having such possibility in view they had made express provision as to their rights and liabilities in the event of such occurrence. This is the theory of implied term *(Dahl's case).*[119] Lord Wright has observed: "The court personifies for this purpose the reasonable man.....the doctrine is invented by the court in order to supplement the defects of the actual contract. To my mind the theory of implied condition is not really consistent with the true theory of frustration. It has never been acted upon as a ground of decision but is merely stated as a theoretical explanation." *(Denny, Mott and Dickensaion Ltd. case)*.[120]

English decisions have thrown up three theories in justification of the Doctrine of Frustration:

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118 *Hirji Mulji v. Cheong Yue SS Co. Ltd.,* (1926) AC 497.

119 *Dahl v. Nelson, Donkin and Co.*, (1881) 6 AC 38.

120 *Denny, Mott and Dickensaion Ltd. v. James B. Fraser & Co. Ltd., (1944) AC 265.*

(1) Implied Term Theory.

(2) Theory of disappearance of the foundation of the contract.

(3) Theory of the court exercising power to qualify the absolutely binding nature of the contract in order to do what is just and reasonable in the new situation.

These theories have been evolved to adopt a realistic approach to the problem of performance of contract. When it is found that owing to causes unforeseen and beyond the control of the parties intervening between the date of the contract and the date of performance it would be both unreasonable and unjust to exact its performance in the changed circumstances. The necessity of evolving one or the other theory was due to the common law rule that courts have no power to absolve a party to the contract from his obligation. On the other hand, the courts were anxious to preserve intact the sanctity of contract yet the courts could not shut their eyes to the harshness of the situation consequent on supervening unforeseen events. While the situation above stated is the result of the common law in England such a situation is not to be faced by courts in India because of sections 32 and 56 of the Indian Contract Act. So far as the courts in Indian are concerned, they must look primarily to the law as embodied in sections 32 and 56 of the contract act in *Ganga Saran v. Firm Ram Charan Ram Gopal*,[121] and in *Satyabrata Ghose v. Mugneeram Bangur and Co.*[122] While under the English Law

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121 *Ganga Saran v. Firm Ram Charan Ram Gopal*, AIR 1952 SC 9.

122 *Satyabrata Ghose v. Mugneeram Bangur and Co.,* AIR 1954 SC 44.

the question of frustration is a question of construction of contracts, under the Indian Law it is a question of positive law contained in sections 32 and 56 of the Contract Act. Where the court as a matter of construction comes to the conclusion that the contract itself contains a term express or implied to the effect that the contract would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56. In English Law such cases would be treated as cases of frustration. In India, they would be dealt with under section 32 and the matter is not left to be determined according to the intentions of the parties.

The scope of the Doctrine of Frustration in England is rather wide. "It seems necessary however to clear up some mis-conceptions which are likely to arise because of the complexities of the English Law on the subject. The Law of Frustration in England developed as is well known, under the guise of reading implied terms into the contract. The court, imply a term and treated that as part of the contract. In deciding cases in India we have to go by the doctrine of supervening impossibility or illegality as laid down in section 56 of the Contract Act which lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The court can grant relief on the ground of subsequent impossibility when it finds that the purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances, which were not contemplated by the parties at the date of the contract. There would in such a case be no question of finding inference of implied term agreed to by the parties embodying a provision for discharge because the parties did

not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstances which is so fundamental has to be regarded by law as striking at the root of the contract as a whole occurs, it is the court which can pronounce the contract to be frustrated and at an end. This is really a positive rule enacted in section 56 which governs such situations."[123]

In English Law Doctrine of Frustration being dependent on the construction of a contract permits itself to be affected by a stipulation in the contract excluding its applicability in stated circumstances. Parties can thus contract themselves out from the ambit of the legal consequences of the Doctrine of Frustration if they so choose. As an illustration in a chartered party, if there is inordinate delay according to law, Doctrine of Frustration is applicable and the contract is automatically dissolved irrespective of the intention of the parties but there is nothing to prevent the parties from stipulating in the contract that in such a situation the contract will not stand dissolved because of the Doctrine of Frustration. While in India, it is doubtful if parties can stipulate that frustration will not apply because of certain supervening circumstances, which the court would consider as qualifying for frustration. Though even in India parties can incorporate a *Force Majeure* clause but its operation is restricted and it would not deprive the court of its power to pronounce a contract as frustrated if it comes within the ambit of section 56 of the Contract Act. What are the permissible categories of contingencies for incorporation in a *force majeure* clause is an interesting subject of study but generally speaking contingencies of delay due to circumstances beyond the control of the performing party

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123 *Satyabrata Ghose v. Mugneeram Bangur and Co.,* AIR 1954 SC 44.

unforeseen at the time of entering into the contract could be so incorporated and would be valid and binding. If the parties are interested in continuing the contract and avoid frustrated in such a situation they can do so. But if the supervening event destroys the very foundation of the contract and goes to the root of it even though the parties may stipulate that such an event would not frustrate the contract yet court can hold that the contract stands frustrated.

4.9 CONCLUSION:

The simplest way of frustration is where the event interfering with performance is totally, unexpected and such as the parties could not reasonably have foreseen, but the doctrine is wider in scope that it is clear that prima facie a contract may be discharged by frustration even though the parties foresaw or ought to have foreseen the frustrating event; but where, by reason of special knowledge, one party foresees the possibility of the event and conceals this from the other, the party with the special knowledge will not be discharged. Where the parties have made provision for the foreseen event the doctrine of frustration will as a rule have no application, except in cases of frustration by supervening illegality; but in certain cases the parties may not be taken to have envisaged the extent of the circumstances which in fact interfered with performance, and in such cases the doctrine of frustration, and not the express provision, will govern their position.

The object of the doctrine of frustration is to find a satisfactory way of allocating the risk of supervening events. The doctrine does not prevent the parties from

making their own provision for this purpose. They can expressly provide that the risk shall be borne by one of them, not by the other, or they can apportion it or deal with it in any other way they like or let it lie where it falls.

Two general propositions must be considered as vital to the doctrine of frustration: (1) contract should not be frustrated by an event expressly provided for in the contract; (2) contract should not be frustrated by an event which was or clearly should have been foreseen by the parties. In the first, the parties have allocated the risk, in the second; they have consciously accepted the risk so that the obvious inference would be that they intended the loss to lie where it might fall.

One of the knottiest problems which has to be tackled in the realm of the law of frustration is when can a supervening event be said to have been foreseen or should have been foreseen or foreseeable by the parties? While the factum of the event having been foreseen can be proved by actual evidence, the real difficulty arises when we have to embark on an enquiry whether the event should have been foreseen or was foreseeable. The standard to be adopted has necessarily the capacity of the human beings to foresee events cannot be uniform. Though the capacity may vary from man to man, the test by which any man is to be judged is the objective test applicable to every man.

One of the difficult questions in the law relating to frustration is whether a contract can be frustrated by an event, which was or should have been foresee by the parties? When we talk of contingency foreseen or foreseeable, it can only mean foreseen or foreseeable by a person of ordinary intelligence, not a soothsayer. This

question has to be considered against the background of the concept of the executory contract as an arrangement for allocation of all risk including that of supervening event. Parties to a mercantile contract can only contemplate risks of ordinary uncertainties, which exist when a contract is concluded. Such a contract cannot be insurance against all future risks.

What are the tests to be adopted to determine whether an event can be said to be foreseeable at the time of entering into the contract? With the advance of science and the immediate availability of information throughout the globe by modern methods of communication, what may not be foreseeable in yesteryears would be considered to be foreseeable in modern times.

It is not unknown that modern business, particularly in international sphere by multinational concerns, is conducted after due consultation with the agencies which specialize in furnishing advice about predictable pattern of the future events in any particular country in any special sphere based on available information and by applying their latest methods to that information. This end is achieved not only by using human talent but computers also. Day is not far off when even in domestic contracts, business house may take advice of consultants regarding future conditions that may be prevalent not only in financial market but commodity market, labour and regarding all other factors which would go into the decision making process. As the area of foreseeability increases, correspondingly the area of frustration of contract would diminish.

Even the predictability of occurrence of acts of god is made possible by modern technology as floods,

heavy rains, storms at sea, typhoons, cyclones can be predicted by meteorologists correctly because of information collected by satellites and fed to the computers. With the advance of knowledge in this sphere, even the scope allowed by law to acts of God as the justifying excuse for non-performance of the contract is being rapidly reduced. While area of predictability is enlarged, inevitability of a supervening circumstances resulting in impossibility remains unaffected.

CHAPTER - V

FOUNDATION OF LIABILITY FOR BERACH OF CONTRACT

5.1 INTORDUCTION:

The basic foundation of every action of damages In the case of contract is a result or outcome of breach of contract. It is but obvious that such breach of contract is always a wrongful act in the eye of law and subject matter of different remedies. Damage for breach of contract is one of them. Therefore, whenever a breach of contract is proved or the case is made out that the breach is committed, law infers some damages to the plaintiff, and according to maxim *ubi jus ibi remedium* the common law of England as well as India considers that there is no wrong without a remedy, and the remedy is by way of an action for damages, is one of the most important amongst others. There are different ways in which liability in breach of contract may arise.

(I) Liability may be imposed as a legal consequence of a person's act, or of his omission if he is under a legal duty to act. Liability may also be imposed upon one person as the legal consequence of the Act or the omission of another person with whom he stands in some special relationship such as the contract between the employer and employee.

(II) In some cases, liability based upon fault; some times an intention to injure is required but more often negligence is sufficient. In other cases, which are called cases of strict liability, liability is in varying degrees independent of fault.

(III) Whereas, most of the breach require damage resulting to the plaintiff which is not to remote a consequence of the defendant's conduct, a few, do not require proof of actual damage.

5.2 INJURY IMPORTS DAMAGE:

The Chief Justice Holt puts the aforesaid concept in a very remarkable way in the following manner:

"Every injury", said Chief Justice Holt in *Ashby v. White*[1], "imports a damage, through it does not cost the party one farthing, and it is impossible to prove the contrary: for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear though it costs him nothing, yet he shall have an action, for it is personal injury. So a man shall have an action against another for riding over his ground though it does him no damage; for it is an invasion of his property and the other has no right to come there; and in these cases the action is brought *vi et armis*." This was a case in which a person who had a right to vote at a Parliamentary election, was held entitled to maintain an action for damages against the returning officer for maliciously refusing to register his vote though person for whom he offered to vote were elected.

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1 *Ashby v. White,* (1703) 2 Ld. Raym. 938*;* Smith L.C. Edn. 264; *The Municipal Board of Agra v. Ashraf Ali*, AIR 1922 All. 1 at pp. 3,4; *Draviyam Pillai v. Cruz Fernandex,* 26 M.L.J. 704; *Chunilal v. Kripashankar, 8* Bom. L.R. 838, Sartolhama Rao v. Chairman, M.C. Saidpt, *AIR 1923 Mad. 475 at pp. 477, 478.*

The Chief Justice Holt said that "Every injury imports damage, though it does not cost the party one farthing, and it is impossible to prove the contrary: for damage, when a man is thereby hindered of his right".

5.2.1 Infraction of Rights, Actionable:

The subject of the cause of action for recovery of damages is wide and varied, and it is beyond the scope of this work to define the precise limits within which an action for damages lies. With the increasing complexity of modern civilization, conflict of rights must inevitably become more frequent and consequently new infractions of established rights are bound to occur. It is proposed to give here certain well-established rules, which determine the relation between cause of action and damages.

5.2.2 Cause of action defined:

The precise definition of cause of action was laid down by the Court of Appeal in England in the case of *Read v. Brown.*[2] Lord Esher, M. R. Said: "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, is the cause of action." Fry, L.J. in the same case said: "Everything which if not proved, gives the defendant an immediate right to judgment must be part of the cause of action." This definition of the meaning of cause of action has been adopted by the various High Courts in India[3], and it may be taken as well settled that the expression "cause of

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2 *Read v. Brown,* (1889) 22 Q.B.D. 128 : 58 L.J.Q.B. 120.

3 *Muhammad Zakariya v. Muhammad Hafiz,* 41 I.C. 233; *Rajabhai Narain v. Haji Karim Mamood,* 35 M.L.J. 189; *Manjamma v. Sattiraju,* 31 M.L.J. 816.

action" means "that bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case".[4] It can have no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It has reference entirely to the grounds set up in the plaint as the cause of action, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.[5] The plaintiff's alleged cause of action is to be sought for within the four corners of the plaint,[6] but the plaintiff cannot be tied down to the date of the accrual of the cause of action mentioned in the plaint, for the Court is entitled to determine the date on which the cause of action arose from the facts alleged and proved.[7]

5.2.3 Cause of action, when arises:

Speaking generally, a cause of action may be said to arise when and as soon as the party has the right to apply to the proper Tribunals for relief and an infringement of the plaintiff's right gives him a right so to apply for relief. However, in order to make out a cause of action it is essential to allege an prove the facts necessary to establish a right and the conditions and circumstances in which the infringement of the right took place. Whenever, therefore, a plaintiff establishes a perfect, as opposed to an imperfect, right and that right has been violated by the defendant, a cause of action arises in his favour, to enforce which he is entitled to bring an action. In other words, the plaintiff has

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4 *Muza Yaqub v. Manilal,* I.L.R. 29 Bom. 368; *Raghoonath v. Govindnarain*, I.L.R. 12 Cal. 45.

5 *Chand Kuar v. Partap Singh,* I.L.R. 16 Cal. 98.

6 *Jibunti v. Shibnath,* I.L.R. 8 Cal. 819; *Namoo v. Anand,* I.L.R. 12 Cal. 291.

7 *Fateh Ali v. Muhammad Bakhsh,* AIR 1928 Lah. 516 at p. 523.

to state the facts upon which the right is based and the manner in which it has been infringed.

It is, however, essential that the contract must be a legally enforceable contract. A contract illegal at the inception, as where the consideration is unlawful, is not an enforceable contract; and a breach of such a contract does not afford a cause of action for damages. Even a subsequent promise based upon such a transaction cannot emerge into a valid contract. Thus, where a forward contract in groundnut oil is entered in face of the Oil and Oil-cakes Prohibition Order, and the parties thereto subsequently mutually agreed to pay and receive damages for breach of such illegal contract, a suit to recover on the basis of such subsequent agreement is not maintainable.[8]

5.3 BASIC PRINCIPLES:

5.3.1 *Injuria abseque damnum*:

This case illustrates the principle underlying the maxim *ex injuria shine demno oritur actio*, that is, an action arises from a wrongful act though no pecuniary loss has taken place. This is more compendiously expressed as *injuria absque damnum*. In this as well as in the correlative maxim, which will be considerable later on, the word *injuria* is used to signify a wrongful act and *damnum*, the invasion of a legal private right, however, trivial the infliction of actual loss or damage.

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[8] *Sadasivayya v. Venkatanarayana & Co.,* AIR 1953 Mad. 845, 846 : (1953) 1 M.L.J. 811 : 1953 M.W.N. 561 : *Contra Maheshwari Metals and Metals Refinery v. Tamil Nadu Small Industries Corporation Limited.* (1982) 1 M.L.J. 35 at pp. 48, 49.

5.3.2 Infringement of legal right actionable:

Therefore, as Broom puts it, *injuria absque damnum* may be said to be unknown to our law,[9] in other words, wherever there is an act or omission, which the law deems an injury, it is presumed that some damage has been suffered by the party injured.[10] In other words, therefore, to maintain an action upon an infringement of a right, it is not necessary to show any injury resulting from the infringement,[11] and a plaintiff, whose right has been invaded, is entitled to a remedy, whether any damage accrued or not,[12] so much so that, as the Privy Council has observed "there may be, where a right is interfered with, *injuria sine damnum*, sufficient to found an action."[13]

Again in well-known cases also though there were no actual damages suffered by the parties to the contract, the Courts took different views keeping in mind the concept of breach of contract. In a well-known case of *Marzetti v. Williams,*[14] it was held that a customer is entitiled to maintain an action against his banker, who, having sufficient funds of the constituent in his hands, wrongfully refused to cash his cheque. On the same principle, it was held that a riparian proprietor is entitled to maintain an action against the owner on the opposite bank who had built an obstruction into the stream, so as to interfere with the flow of water, though no actual or immediate damage was proved to have

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9 *Broom's Legal Maxims*, 8th Edn. p. 182.
10 *Marzetti v. Williams,* (1830) 1 B. & Ad. 415; *Williams v. Peel river Land and Mineral Co.,* (1985) 55 L.T. 689; *Ashby v. White,* 1 Sm. I.C. 264.
11 *Ramchand v. Nuddiar Ghose,* 23 W.R. 230.
12 *Rampal Sahu v. Misree Lall,* 24 W.R. 97; *Hari v. Hari,* 15 I.C. 541.
13 *Kali Kisen Tagore v. Jadoo Lalmullick*, 5 C.L.R. 97 at p. 101.
14 *Marzetti v. Williams,* (1830) 1 B. & Ad. 415.

ensued.[15] Where the plaintiff had been enjoying the exclusive right of breaking, on a certain day, a curd pot in a temple, it was held that the defendant's act in breaking their own curd pot on that day, was a violation of a legal right entitling the plaintiff to recover damages.[16] Again a refusal to deliver up an idol, whereby the person demanding it was prevented from performing his turn of worship on specified date, gives him a right to sue for damages.[17]

So also, where the manager of a hotel refused to provide board and lodging to a guest without just cause or excuse it is a violation of a right founded upon common law and is actionable without proof of damage.[18]

In these and several other cases, which the Court shall have, occasion to refer to in the succeeding chapters; nominal damages only were awarded for want of proof of special damage, on the broad principle that their recovery would sufficiently vindicate plaintiff's right.

5.3.3 *Damnum Absque Injuria:*

Every contract has always at least two persons to it, the promisor and the promise, between whom there is necessarily privity. The essence of a contract being that either party is bound to perform his part in its entirety, it follows that non-performance by one gives other a right to sue either for specific performance, or for damages, or for

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15 *Bickett v. Morris,* (1866) L.R. 1 H.L. Sc. 47; *Ramchand v. Nuddiar Ghose*, 23 W.R. 230; *Maung Bya v. Maung Kyi Nyo,* AIR 1925 P.C. 236 at pp. 238, 239; *Harrop v. Hurst*, (1968) L.R. 4 Exch. 43; *Madhav Shivram v. Rakma Bhaushet,* 9 Bom. L.R. 864.

16 *Narayan v. Balakrishnan,* 9 Bom. H.C.R. (A.C.) 413.

17 *Debendranath v. Odit Churn,* I.L.R. 3 Cal. 390.

18 *Constantine v. Imperial London Hotels Ltd.,* (1944) 2 All. E.R. 171 (Q.B.D.)

both according to the nature and subject-matter of the contract, not by reason of any express stipulation in the contract itself but by reason of law.[19]

That is the reason that while asking for a damage, the relief cannot be asked for every species of loss which individuals might sustain by the acts of others. One may say that by the act of others with whom the claimant does not have privities of contract. A man cannot be held liable merely because his act has caused loss or damage to another under the head of "Damages for Breach of Contract". There must be a corresponding right in that other, the infraction of which is made actionable by the law. Where though, actual damages sustained it is not occasioned by anything which law deems an injury. Such damage is termed *Damnum Absque Injuria* and maxim *Ubi Jus Ibi Remedium* has no application in such a case.

The very landmark decision is of the school master who established a rival institution which draw away the scholars from the plaintiff's school which previously established may be mentioned and put here as a best example of this principle.[20] Every man has undoubted right to pursue a calling best suited to his tastes, and if in the legitimate exercise of that right another person suffer damage, the damage so sustain is called *Damnum Absque Injuria*. So also, if in the prudent and reasonable exercise by an owner of a property of his right dominion another sustains damage, it is *Damnum Absque Injuria.*

Thus in an action against a person who by lawful means induced a servant to determine lawfully his conduct of

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19 *Rajeshwar Prasad v. Chunilal,* AIR 1942 Pat. 269 at p. 270.

20 Gloucester, Grammar School, (1411) Y.B. 11.

service or not to enter into a contract of service, it was held that there was no *injuria*.[21] Similarly, in case of traders, who by concerted action but illegal means, acquired the business enjoyed by other traders, though the actual damage may be considerable, no relief will be given because the damage occurs in the course of the legitimate exercise of a right recognized and protected by the law.[22]

Again where a land-owner on one side of a tidal and non-navigable *khal*, which was the property of the Government, complained of the obstruction caused by the defendant constructing a wall in encroachment of the stream, on the ground that damage might result the flow of the stream had been perceptibly altered, it would be a case of *Damnum Absque Injuria* and that no action is maintainable where there is neither *damnum* nor *injuria*.[23]

Where in a case the appellants had proposed to celebrate a ceremony in honour of their grandfather's death in accordance with the custom of their community and they alleged that the defendants had decided to prevent the performance of the ceremony and with that view they had distributed handbills in the town to dissuade the persons invited to the function from accepting the invitation and also to prevent them from attending it by means of picketing. It was held that the plaintiffs could have no cause of action for an order of injunction.[24] So again persons, who accepted an invitation to an entertainment at the plaintiff's house, failed to attend, through no concerted action, were held not liable for damages caused to the plaintiff on account of the

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21 *Allen v. Flood,* (1899) A.C. 1.
22 *Moghul Steamship Co. v. Mc Gregor,* (1892) A.C. 25.
23 *Kali Kishen Tagore v. Jadoo Lal Mullick,* 5 C.L.R. 97 : 6 I.A. 190.
24 *Dip Chand v. Manak Chand,* AIR 1959 Nag. 154 at pp. 155-156.

price of the food unconsumed because of their absence.[25] So also a pleader was held not entitled to sue a Magistrate for damages for not allowing him to appear for a complainant in an inquiry under Sec. 180 of the Code of Criminal Procedure of 1861, because a pleader has no right ot appear in such an inquiry and, therefore, by reason of the refusal of permission, he suffered no *injuria*.[26] Similarly, where a plaintiff, who was entitled as a member of a particular caste, to receive certain presents on the occasion of a funeral ceremony, was omitted from the recipients, he was held not entitled to sue for damages for the loss of those presents, or even for an injury to his character and reputation, on the ground that there is no *injuria damnum*.[27] So also in a suit by the plaintiff, who was prevented from parading a bull on a certain day,[28] so again accidentally inflicting personal injuries without negligence or intention is not actionable.[29] Again a landowner who built upon his own land in such manner as to obstruct his neighbour's light[30] or air[31] or erected barriers against floods causing them to flow on to his neighbour's land was held not liable in an action for damages.[32]

Again a landlord, upon whom there is no duty to maintain a dam with a sluice, was held not liable for damage caused to the neighbour's lands, when there is no proof of wrongful act or omission.[33] Where statutory bodies acting in the

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25 *Kalai Haidar v. Shaik Kyamuddi,* 23 W.R. 417.
26 *Bindachari v. Dracup,* 8 Bom. H.C.R. (A.C.) 202.
27 *Maya Shankar v. Hari Shankar,* I.L.R. 10 Bom. 661.
28 *Rama v. Shivram,* I.L.R. 6 Bom. 116.
29 *Stanley v. Powell,* (1891) 1 Q.B. 86; *Fowler v. Zamming,* (1959) 1 All. E.R. 290 : (1959) 2 W.L.R. 241.
30 *Tappling v. Jones,* (1895) 11 H.L.C. 290.
31 *Chasteby v. Auckland,* (1897) App. Cas. 155.
32 *Rex v. Pagham Commissioners,* (1828) 8 B. & C. 355.
33 *Kadar Baksh v. Ram Nag,* 47 W.R. 48; *Anand Singh v. Ramchandra,* AIR 1963 M.P. 28 at pp. 28,29.

exercise of powers conferred upon them by statute, cause damage to others it is a case of *damnum sine injuria* for which no action lies unless there is proof of negligence.[34] But against the damage done in breach of that duty they have no protection.[35]

But when the defendant was not in know of the discoverable defect or danger and it caused the damage by accident like sudden fall of the tree, it would be difficult to visualize that the defendant had knowledge of the danger and he omitted to perform the duty of care to prevent its fall. There would be no special relationship between the statutory authority and the plaintiff who is a remote user of the footpath or the street by the side of which the trees were planted. Unless the defendant is aware of the condition of the tree that it is likely to fall on the footpath on which the plaintiff/class of persons to which he belongs frequents it. The defendant by his non-feasance is not responsible for the accident or cause of the death since admittedly there was no visible sign that the tree was affected by disease. It had fallen in a still condition of weather.[36]

5.3.4 Special damages are also required to be proved:

But, apart from the legal damage, which the law presumes in every case of violation of right, the plaintiff may aver and prove substantial actual pecuniary or other loss or damage, which may have resulted from any wrongful act. As Bowen,

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34 *Mersey Docks v. Gibbs,* (1864) L.R.J. H.L. 93; *Vaughan v. Taff Valley Rly. Co.,* (1860) 5 H. & N. 679; *Madras Rly. Co. v. Zamindar of Carvetnagar,* 22 W.R. 279 (P.C.).

35 *Geddis v. Bann Reservoir,* (1978) 3 A.C. 430; *Gaekwad of Baroda v. G.I.O. Rly.,* 27 Bom. 344.

36 *Rajkot Municipal corporation v. Manjulben Jayantilal Nakum,* 1997 (2) T.A.C. 461 at p. 497 (S.C.).

L.J., observed in *Williams v. Peel River Land and Mineral Co. Ltd.*[37] "If there be no substantial loss sustained, but the mere denial of the right, which rights is vindicated in the action, in such a case, there being no pecuniary damage, sustained, no pecuniary compensation is given and nominal damages will be enough; but if a substantial loss has been suffered in consequence of the wrongful act, what those who have to redress the wrong ought to do is to give compensation for the loss.

Thus, it has been held that a plaintiff, who has an exclusive right to collect weighment fees in a bazaar, is entitled to sue for damages for being wrongfully obstructed in the exercise of the right and in making the collections.[38] The refusal by the master of a ship to sign the bill of lading otherwise than with an endorsement as to the damage claimed is a wrong that may be fully compensated in damages.[39]

But the mere fact that the plaintiff, who alleges substantial damage, fails to prove the same, is no ground for dismissing the suit in toto, for in such a case the plaintiff is a least entitled to recover nominal damages,[40] and the same result follows in cases where there is no evidence at all given in proof of actual damage.[41] For, the principle ordinarily applicable to actions of breach of contract is that the plaintiff is never precluded from recovering ordinary damages, which, as has been already observed, includes

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37 *Williams v. Peel River Land and Mineral Co. Ltd.* (1886) 55 L.T. 689 : 3 T.L.R. 76 (C.A.).

38 *Bhankno Oujiah v. Harkjh Kandu,* 9 A.W.N. 89.

39 *Grasseman v. Littlepage,* 3 W.r. (Refer Reedr. Moulmein) 1.

40 *Feize v. Thompson,* (1808) 1 Taunt 121.

41 *Dixam v. Deveridge,* (1852) 2 C. & P. 109 N.P.; *Twyman v. Knowles,* (1853) 13 C.B. 222.

nominal damages by reason of his failing to prove the special damage he has laid unless the special damage is the gist of the action.[42]

If, however, special damage is the gist of the action, failure to prove the same disentitles a person to recover any damages.[43] For instance, in cases where an interference with the contractual relations of parties is actionable, substantial damage must be proved for damage is the gist of such an action. In order, therefore, to succeed and make a good case for either damages or an injunction, damage must be proved, not indeed, damage in detail or special damage in the narrow sense of that epithet, but actual damage.[44]

5.4 REQUIREMENT OF ACT OF INTERFERENCE WITH A CONTRACT OR BUSINESS:

The Act of interference with a contract or business requires the defendant to act in such a manner as would result in the plaintiff being prevented from performing his contract. Questions pertaining to this action normally arise in the case of industrial disputes. In the present case, defendant no.2 has not done anything as a result of which the plaintiff is prevented from performing his contract. He has been prevented, not from performing his contract but from reaping any benefit under the contractual right, which exists in his favour. What is more important, the plaintiff has not been so prevented on account of any action, of defendant No.2 merely filed a suit for obtaining certain relief's. In this suit, the Court passed certain orders. It was as a result of

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42 *Madhum Mohum Dass v. Gokhul Dass,* 10 M.I.A. 563 at p. 575.

43 *Edward Wilson v. Kanhaya Sahoo,* 11 W.R. 143 at p. 144.

44 *National Photograph Co. v. Edison Bull Consolidated Photograph Co. Ltd.,* (1908) 1 Ch. 335, per Kennedy, L.J.

the orders passed by the Court that the plaintiff was prevented from reaping the benefit of his contract. Hence defendant No.2 cannot be held guilty of preventing the plaintiff from performing his contract.

5.5 PROCURING BREACH OF CONTRACT:

The principle of law governing the breach of contract has been reviewed by the Court of appeal in England in the case of *Thompson (D.C.) v. Deakin.*[45] That intentionally and without lawful excuse to induce a person to break his contract with another is a specific breach has been held by the Court of Queen's Bench in *Lumley v. Gye,*[46] more than a century ago; subsequently the rule has been affirmed by the House of Lords in *Quim v. Leathem,*[47] and in *South Wales Miners' Federation v. Glamorgan Coal Co.*[48] In the former of these two cases Lord Macnaghten has stated the principle in the following terms: " a violation of legal right committed knowingly is a cause of action .. .. .. It is a violation of legal right to interference with contractual relations recognized by law, if there be not sufficient justification for the intereference."[49]

This rule, which was at first applied to contracts of personal service, has now been extended to contracts of other kinds, unless the contract itself is void and unenforceable or where the contract is determinable at pleasure.

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45 *Thompson (D.C.) v. Deakin.* (1952) 2 All. E.R. 161 : (1952) Ch. 646; *Yarlagadda China Ramayya v. Donepur Venkata Ramayya,* AIR 1959 A.P. 552.

46 *Lumley v. Gye,* (1853) 2 E.&B. 216.

47 *Quim v. Leathem,* (1901) A.C. 495.

48 *South Wales Miners' Federation v.* Glamorgan Coal Co., (1904) 2 All. E.R. 361.

49 *Quim v. Leathem,* (1901) A.C. 495 at p. 510.

The occasion for review of the entire case-law on the point arose out of a motion for an interlocutory injunction under the following circumstances: The plaintiffs in *Thompson (D.C.) v. Deakin,*[50] a firm of printers and publishers, required all their employees to sign an undertaking that they would not become members of any trade union. But in disregard of the undertaking some of the employees joined the National Society of Operative Printers and Assistants. The plaintiffs thereupon determined to terminate the employment of one of those who broke the undertaking, and who in consequence appealed to the union. As a kind of reprisal the union called out on strike those of its members who were in the employ of the plaintiffs, and also sought the help of other unions concerned in the supply of raw materials to plaintiffs. The employees of Bowaters Sales Ltd., who were suppliers of raw materials to the plaintiffs having consequently expressed their unwillingness to deliver any material to the plaintiff, the company resolved not to press their employees to co-operate in the deliveries, with the result that the supplies from that company ceased to go to the plaintiffs in breach of the contract between the company and the plaintiffs. The company also wrote to the plaintiffs “We are prevented from performing our contract by the action of the trade unions which has put a stop to any of your paper being loaded at and delivered from Bowaters Mersey Paper Mills, Ellesmere Port.

We anticipate that this pressure will continue and may increase, and until withdrawn we shall be unable to make deliveries under the contract.” The plaintiffs thereupon sought an injunction against the officials of the union restraining them from causing or procuring a breach or

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50 *Thompson (D.C.) v. Deakin,* (1952) 2 All. E.R. 361.

breaches of the contract between the plaintiffs and Bowaters Sales Ltd., and for damages, and applied for interlocutory relief. The Trial Judge, Upjohn, J., refused to grant an injunction by holding that there never had been any direct action by the defendants or their agents with the object of persuading or causing Bowaters Company to break their existing contracts with the plaintiffs. The action of the trade unions in causing the employees of the company to break their contract of employment by refusing to load supplies to the plaintiffs, was a lawful act, although the natural consequence thereof might be to compel the Bowaters Company to break their contract with the plaintiffs, such an action was, therefore, insufficient to constitute or inducing a breach of contract. The Court of Appeal consisting of Sir Raymond Evershed, M.R. Jenkins and Morris, L.J.J., in upholding the order of Upjohn, J., reviewed the case-law on the question and laid down the following principles:

Apart from a conspiracy to injure acts of a third party which are lawful in themselves do not constitute an actionable interference with contractual rights, even if done with the object and intention of bringing about such a breach.[51] It makes no difference that such acts were done out of spite, malice or ill-will. Acts which are lawful in themselves are not rendered unlawful merely because the doer of them was actuated by malice or bad motive. The essential ingredients of the breach of obligation procuring a breach of contract are:

(a) Where a third party, with knowledge of the contract and with the intent to procure the breach of it directly

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51 *Croffer Handwoven Harris Tweed Co. Ltd. v. Veitch,* (1962) 1 All. E.R. 148; *Gangiah v. Gangadharan,* AIR Mys. 170 at p. 181.

persuades or procures or induces one of the parties to the contract or break it. This rule is illustrated by *Lumley v. Gye.*[52]

(b) Where a third party instead of acting on the mind of the contract breaker, physically detains him or otherwise renders it impossible for him to perform his contract, e.g. by breaking his essential tools or machinery. These acts must, of course, be done with knowledge of the contract and with intent to bring its breach.

(c) Where a third party and the contract breaker deal together in a manner which the third party knows to be inconsistent with the contract, e.g. when A pays for and takes delivery of a new car from B, knowing that it is offered to him in breach of a covenant against the re-sale of a new car.[53]

The inconsistent dealing between the third party and the contract breaker may be commenced without knowledge by the third party of the contract thus broken, but if it if continued after the third party has notice of the contract, he has committed an actionable interference.[54]

(d) Again so far from persuading or inducing or procuring one of the parties to the contract to break it, the third party may commit an actionable interference with the contract against the will of both and without the knowledge of either,

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52 *Lumley v. Gye,* (1853) 2 E.&B. 216; The judgment of Jenkins, L.J. in *Thomson v. Deakins,* (1952) 2 All.E.R. 366 at 378.

53 *British Industrial Plastics Ltd. v. Freguson,* (1938) 1 All. E.R. 863 afid. In (1940) All. E.R. 479 and *British Motor Trade Association v. Salvadore,* (1949) All. E.R. 208.

54 *De Francesco v. Barnum,* (1890) 45 Ch.D. 430.

if with the knowledge of the contract, he does an act which, if done by one of the parties, it would have been a breach.[55]

(e) Where a third party, with knowledge of the contract and intent to break it, definitely and unequivocally persuades, induces or procures the servant of one of the parties to break his contract of employment, provided that the breach of the contract forming the alleged subject of interference in fact ensues as a necessary consequence of the breach of contract of employment. [56]

The emphasis laid here by the Court of Appeal is on the casual connection between the defendants' conduct and the interference with the contract where the contract breaker is a servant under a contract of employment. There must be clear proof that:

1) the defendant, A, knew of the contract between B and C, and intended its breach;
2) that he definitely and unequivocally induced or procured the employee to break his contract with intent to procure the breach;
3) that he did in fact to break his contract of employment;
4) that the breach of the contract forming the alleged subject of interference ensued as a necessary consequence of the breach of contract of employment, in the sense, that by reason of the withdrawal of the services it was a matter of practical impossibility for B or C to perform their contract.[57]

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55 *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.* (1926) 42 T.L.R. 376.
56 *Thomson v. Deakins,* (1952) 2 All.E.R. 366 at p. 379.
57 *Canden-Nominees v. Fore,* (1940) 2 Ch. 352.

There is one topic which, however, requires mention, and which is a statutory exception of procuring a breach of contract. The exception relates to trade disputes and forms the subject matter of Sec.18 of the Trade Unions Act, 1926.[58] Section 18 lays down:

(1) "No suit or other legal proceeding shall be maintainable in any Civil Court against any Trade Union or any officer or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills."

(2) "A registered Trade Union shall not be liable in any suit or other legal proceeding in any Civil Court or in respect of any act done in contemplation or furtherance of a trade dispute by an agent of the Trade Union if it is proved that such person acted without the knowledge of, or contract to express instructions given by, the Executive of the Trade Union."

The object of this provision seems to be to give immunity to a Trade union and its officers, members if they bring about a strike in contemplation or furtherance of a trade dispute even though it results in bringing about a breach of employment of any of the strikers. It would, however, seem

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58 Act XVI of 1926.

that there is no protection against any act which induces a breach of any contract other than that of a contract of employment.[59] So also, it would seem that, if, in contemplation or furtherance of a trade dispute, a procures or induces B to break his contract of employment with C, so as to render it impossible, as he intends, for C to perform his contract with D, the section gives protection to A vis-à-vis C and not vis-à-vis D as well.[60]

5.6 LIABILITY OF MANAGING AGENT OR MANAGING DIRECTOR FOR BREACH OF CONTRACT:

The managing agents or managing director are not liable for the breach of contract with the managed company. The position of the managing agents or managing director in relation to the managed company is that of an agent. It is true that in *Lumley v. Gye,*[61] it was held that:

"A person who, during the continuance of a contract of personal service whether, it be executory or not, wrongfully interrupts the relation subsisting between the parties to the contract by procuring one of them to commit a breach of the contract, whereby the one party to the contract suffers damages and other is liable to the injured party in damages."

Reference in this connection may also be made to *Scammell G. and Nephew Ltd. v. Hurley*[62] and *D. C. Thompson & Co.*

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59 *Bents Brewery Co. Ltd. v. Hogan,* (1945) 2 All E.R. 570.

60 *Thompson, D.C. Ltd. v. Deakin,* (1952) All. E.R. 361 at p. 374, per Sri Raymond Evershed.

61 *Lumley v. Gye,* (1853) 2 E.& B. 216.

62 *Scammell G. and Nephew Ltd. v. Hurley,* (1928) 1 K.B. 419.

Ltd. v. Deakin,[63] where *Said v. Butt*[64] was applied and approved. The result may be different where the servant or agent acts mala fide and outside the course or scope of employment or authority.[65]

5.7 MALICE IMMATERIAL IN CONTRACTS:

Again, in the case of damage arising out of a breach of contract, the motive or conduct of the party guilty of the breach except in the case of breach of contract of marriage as noted above, is absolutely immaterial.

For, if A breaks his contract with B to deliver certain goods or if A fails to pay B the money due under a bond executed by him, the consequence is the same, whether the failure to deliver or pay be the result of an accident or a deliberate intention or design.

The animus of the defaulting party is entirely disregarded in such case and as it will be seen hereafter, the amount of damages is limited to the direct pecuniary loss flowing from the breach of the agreement.

➢ Malice not admitted in breach of contract:

But in actions for breach of contract, evidence of the malicious motives of the party guilty of the breach is entirely irrelevant and the existence of misconduct on the part of the defendant cannot alter the rule of law by which

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63 *D. C. Thompson & Co. Ltd. v. Deakin,* ((1952) 2 All.E.R. 361 at p. 370.

64 *Said v. Butt.*(1920) All. E.R. 240 at p. 241.

65 *Parasharsingh v. Hindustan Managanese Mines Ltd.,* 1968 M.P. L.J. 846 at p. 853.

damages for breach of contract are to be assessed.[66] As Baron Alderson observed in *Hamlin v. Great Northern Rly. Co.*[67] "The damages in actions for breach of contract are ordinarily confined to losses which are capable of being appreciated in money, with the exception of the case of breach of promise of marriage; damages that are not capable of being so estimated, such as, injury to feeling or vexation are not allowed. The principle is, that if the party does not perform his contract, the other may do so for him as near as may be and charge him for the expense incurred in doing so". But where the elements of fraud, violence or malice exist, the alternative remedy of suiting in tort is always open to the injured party and he may then adduce evidence of those matters, which entitled him to claim damages on a different footing.[68]

5.8 POSITION IN ENGLISH RULE AS TO NOMINAL DAMAGES:

The rule that every injury imports damages is under English law and it is strictly applicable when the action is based upon a contract. It was repeatedly said that every breach of duty arising out of a contract gives rise to an action for damages without proof of actual loss. As Thesiger, L.J., observed in *Hiort v. London and North Western Rly. Co.,*[69] "the unauthorized act, whether it be a conversion or whether it be a breach of contract or breach of duty did vest a right of action and for this reason, that the law presumes a damages in respect of that unlawful act." So, in an action a surety where the creditor was found to have made

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66 *Sikes v. Wild,* (1863) 1 B. & S. 587.
67 *Hamlin v. Great Northern Rly. Co.,* (1856) 1 H. & N. 408.
68 Para. 12 Supra.
69 *Hiort v. London and North Western Rly. Co.,* (1879) 4 Exch. D. 188.

advances to the principal debtor, which he was not bound to mark, it was held, that the creditor was not entitled to anything more than nominal damages. So also in an action on the case against the secretary of an insurance company, for false representation as to the management and affairs of the company, whereby the plaintiffs was induced to effect an insurance with it the Court awarded nominal damages though it did not appear that he had sustained any positive loss.[70]

5.9 ESSENTIALS OF THE FOUNDATION OF LIABILITY FOR BREACH OF CONTRACT:

Where there is a duty to take care, as specific condition in a contract itself and not simply as an element in some more complex relationship the parties to contract are duty bound to fulfill the part of their obligation. In a strict legal analysis, breach of contract means more than heedless or careless conduct, whether in the nature of omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing. The Privy Council was loud and clear about the said concept in the view taken in the matter of *Grant v. Australian Knitting Mills*.[71]

The three essential ingredients of the foundation of liability for breach of contract are as follows:

(I) A legal duty on the part of defendant towards the plaintiff to exercise care in his conduct within the scope of that duty provided under the contract;

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70 *Warren v. Calvert,* (1837) 7 Ad. & El. 143.

71 *Grant v. Australian Knitting Mills,* AIR 1936 P.C. 34 at pp. 41-42.

(II) Breach of that duty which is agreed upon by the parties;

(III) Consequential damages to the plaintiff.

5.9.1 Scope of the duty of care:

There is no liability for breach of contract unless in the particular case, there is a legal duty to take care to the plaintiff himself, and not to any other. The duty must be a legal duty and not merely a moral or religious duty. It is not owed to the world at large, because there is no general duty to be careful.[72] All that is necessary as a step to establish the breach of actionable claim is to define the precise relationship from which the duty to care is to be deduced.

5.9.2 Rule of proximity in relation to duty to take care:

It is the case of *Donoghue*[73], which has done much to clarify the law and also got a far-reaching effect in the law of breach. It extends the sphere of liability to some imaginary persons who may not be in the contemplation of the defendant, and requires him to be careful so as not to cause harm or legal injury to any of them. The aforesaid concept is put by Lord Atkin during the course of his speech referred to the observation of A.L. Smith, L.J. in *Le Lievre v. Gould*[74]: "A duty to take care does arise when the person or property of one was in such proximity to take person or property of another that, if due care was not taken, damage might be done by one to the other," and said, "I think this sufficiently states the truth if proximity be not confined to

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72 *Best v. Samuel Fox & Co.,* (1952) 2 All ER 394

73 Donoghue's (1932) A.C. 562.

74 *Le Lievre v. Gould,* (1893) 1 Q.B. 49 at p. 50; *Candler v. Christmas*, 91951) 1 All ER 426.

mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by the careless act." The reference to proximity in the above passage is open to criticisms and Lord Wright stated that it is apt to "mislead". He says,[75] "the word `proximity' is open to ..... objection: if the term `proximity' is to be applied at all, it can only be in the sense that want of care and the injury are in essence directly and intimately connected; `proximity' can only properly be used to exclude any element of remoteness or of some intervening complication between the want of care and the injury, and like `privity' may mislead by introducing alien ideas." Goddard, L.J., however, said in *Hanson v. Wearmouth Coal Co.*,[76] that the legal conception of duty due to "proximity" has been authoritatively laid down by the House of Lords in *Donoghue's* case[77] and that the modern tendency is to enlarge, and not to restrict, the ambit of that duty.

5.9.3 Reasonable man's standard of care:

Care is always a matter of degree but it is difficult to define the precise legal standard of care required in all cases. It is fundamental, that the standard of conduct which is the basis of law of contract is determine by balancing the risk, in the light of the social value of the interests threatened, and the probability and extent of the harm. Again the value of the interest which the actor is seeking to protect, and the

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75 *Grant v. Australian Knitting Mills,* AIR 1936 P.C. 34 at p. 42.

76 *Hanson v. Wearmouth Coal Co.,* (1939) 2 All. E.R. 47 at p. 54.

77 Donoghue's (1932) A.C. 562.

experience of the courts persuade. The standard of care is thus a question of fact depending upon the circumstances of each case.[78] In determination of the standard, courts are called upon to consider how reasonable prudent man would behave under given circumstances. Lord MacMillan gives some of the attributes of a "reasonable man" in his speech in *Glasgow Corporation v. Muir*,[79]: "The standard of foresight of a reasonable man is in one sense an impersonal test. It eliminates personal equation and is independent of the idiosyncracies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path best with lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers.

The reasonable man is presumed to be free both from over-apprehension and from over-confidence." The reasonable man is cool and collected and remembers to take precautions for his own safety even in an emergency. He is one who is able to think and weigh the *pros* and *cons* of his action. The addition of the epithet "prudent" also indicates that he is a man of sufficient wisdom actuated by self-interest and having forethought, discretion and caution. He cannot be equated with a "man in the street". But he must not be expected to act or behave like a perfect citizen.[80]

The qualities of the reasonable man are for the intuition of the court, and the flexibility of the standard would be impaired by over-elaborate rules. "In the realm of negligence," says Lord Reid, "rigid rules give right to avoidable injustice. I see no reason to depart unnecessarily

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78 *Biyth v. Birmingham Waterworks,* (1956) Ex. 781 at p. 783.
79 *Glasgow Corporation v. Muir,* 91943) A.C. 448 at p. 457.
80 *Jones v. Barclay Bank,* (1949) W.N. 196 (C.A.).

from the simple method of asking in my cause; what would a reasonable man in the shoes of the defendant have done?

That test is subject to obvious limitation. In some cases it is impracticable and in many cases it is for one reason or another undesirable to make that which a reasonable man would do as a legal obligation."[81]

- **Reasonable foresight:**

The standard of a care, which a reasonable and prudent man should take is, however, limited by reasonable foresight, i.e. he must use reasonable care to avoid the situations which cause damages because of breach, which are reasonably foreseeable. The consensuses of an act or omission may be numerous and many of them may be within the range of "reasonable foresight" but he is not obliged to guard against every one of them. Law will compel him to guard against those consequences, which are probable, and not against those which are merely possible. "People must guard against reasonable probabilities but they are not bound guard against fantastic possibilities. This does not mean everything, which is not a "fantastic possibility", is a probability.[82]

5.10 PARTIES TO AN ACTION IN CONTRACT WHO MAY SUE:

5.10.1 Remedies for Breach Contract:

Every contract has always at least two persons to it, the promiser and the promisee, between whom there is

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81 *London Graving Dock Co. Ltd. v. Harton,* (1951) 2 All. E.R. 1 at p. 29 : (19510 A.C. 737.

82 *Fardon v. Harcourt Rivington,* (1932) 146 L.T. 391.

necessarily privity of contract existing. The essence of a contract being that earlier party is bound to perform his part in its entirety, it follows that by non-performance by one gives other a right to sue either for specific performance or for damages, or for both according to the nature and subject matter of the contract, not by the reason of any expressed stipulation in the contract itself but by reason of law.[83]

5.10.2 Damages, a personal remedy:

An action for damages is laid for the purpose of seeking personal redress against one who stands in certain special relation, contractual or otherwise, to the plaintiff. It is, therefore, generally a personal action or what is known according to civil law as an action in *personam*. The parties to such an action are the person who suffered the injury and the person who committed the wrongful act. In such an action the plaintiff claims the payment of a sum of money for breach of contract or the violation of right.

5.10.3 Remedy of damages distinguished from relief by specific performance:

The cause of action is the breach of contract, specific performance is merely a relief and not a cause of action, in some cases, the relief of specific performance may be granted and in others it may be refused, and it is entirely at the discretion of the concerned court whether to give any relief by way of specific performance or not. [84]

It is essential that the purchaser must prove his own readiness and willingness to perform his part of contractual

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83 *Rajeshwar Prasad v. Chunilal,* AIR 1942 Pat. 269.
84 *Fernandez v. Gonsalves,* AIR 1925 Bom. 97.

obligation. Readiness and willingness to carry out his obligation is always a condition precedent to the plaintiff's right to recover damages for the breach of contract. Where the plaintiff was not in a position to perform his part of contractual obligation, he was not entitled to recover any damages for breach of contract.[85]

The relief of specific performance, which is in English law, an equitable remedy is regulated in India by the Specific Relief Act and is beyond the scope of this work. On the other hand, the relief of damages is common law remedy, and is open to any party who has sustained an injury on account of the non-performance or breach of a contract. In the language of Sec. 73 of the Indian Contract Act, the party who suffers by a breach is entitled to recover from the party who has broken the contract, compensation for any loss or damage caused to him thereby.

The two relieves i.e. specific performance and damages are alternative and not cumulative, the former being in nature a superior type of remedy. It may be said generally that no person can be the plaintiff in a suit for specific performance of a contract who could not and should not recover compensation for its breach. But the converse is not always true. "For damages form the universal remedy in cases of breach of contract, and it is only in special cases that, with the object of doing more complete justice, the court decrees specific performance." In other words, as has been observed before, every breach of contract gives rise to an action for damages, or for specific performance[86] but, according to the Specific Relief Act, contracts are of two

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85 *Abdulla Bey v. Tevenham,* AIR 1934 P.C. 91 at p. 92; *Tan Ah Boon v. State of Johore,* AIR 1936 P.C. 236 at p. 238.

86 *Nogendra Chandra Mitter v. Kishan Soondaree Dasee,* 19 W.R. 133.

kinds, those which can be specifically enforced, and those which cannot be specifically enforced. However, in regard to the former, courts are empowered to award compensation to the plaintiff, either in addition to, or in substitution for, such performance. With this distinction in mainly, it may be broadly said that the proper person to sue for damages is the person whose right to call for the performance of the contract has been violated.[87]It has even been held that if a third person's name has been mentioned in the contract by mistake, the plaintiff might show by parole evidence that he is the real promise entitled to sue.[88]

5.10.4 Plaintiff to be legally innocent of breach:

The fundamental principle of law being that no person who is not legally innocent of the breach of contract can sue for damages,[89] it follows that the plaintiff who claims damages must have performed or must show his readiness and willingness to perform his part of the contract,[90] and must not have contributed to the breach in respect of which he is suing.[91]

5.10.5 Plaintiff must be the ultimate sufferer because of breach of contract:

The proper person to bring an action under the head of "damages" for breach of contract is the person who is the ultimate sufferer because of breach of contract and the broad principle has been well established that an action

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87 *Gray v. Pearson,* (1970) 5 C.P. 568; *Iswaram Pillai v. Taragan,* 23 I.C. 951 at P. 956 : I.L.R. 38 Mad. 753.

88 *Mohammad Bhoy v. Chutterput Singh,* I.L.R. 20 Cal. 854.

89 *Mulji v. Ramsey Devraj,* 3 I.C. 387 at p. 857.

90 *Totaram v. John's Flour Mill,* 10 I.C. 18;
Tan Ah Boon v. State of Johore, AIR 1936 P.C. 236 at p. 238.

91 *Mohammad Habibullah v. Mohammad Shafi,* 50 I.C. 948.

does lie at the instance of person who is not a party to the contract i.e. the third party. It is well settled that no action can be brought except for the breach of contractual right, and the person, who sustains the damages, i.e. whose legal contractual rights are violated, is the person who bring an action for the damages against the person who is responsible for the breach of contract. No one as can bring an action under any head who is not a party to a contract. It follows therefore, that *A* can never claim damages merely on a ground that *B* has suffered with the loss because of breach of contract committed by *X*.[92]

Nice question has arisen as to whether a right to sue for damages exist in a person whose stands in a certain natural or contractual relationship with the person injured.

5.10.6 Right of assignee in case of suit for damages for breach of contract:

In the case of assignees again, the Indian Contract Act has made no provision specifically dealing with their rights. Speaking generally, the benefit of a contract can be assigned but not the burden. This is also subject to the same exceptions, in the case of purely personal contract, as have been understood to affect the rights of executors. “It is equally clear that the benefit of a contract can be assigned, and whatever the consideration has been executed, and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned and be put in by the assignee in his own name after notice.”[93]

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92 *Girwarsingh v. Siramansingh,* I.L.R. 32 Cal. 1060.

93 *Tolhurst v. Asociation of Cement Manufacturers,* (1902) 2 K.B. 660 at pp. 668, 669.

5.10.7 Suit for damages by legal representative:

The right of the legal personnel representative of a deceased who sue has been so well established that it is unnecessary to elaborate it in this research work. As was said by Lord Abinger in *Raymond v. Fitch*,[94] "the authorities are uniform that a personal representative may sue not only for all debts due to the deceased by speciality or otherwise, but for all covenants and indeed, all contracts with the testator broken in his lifetime, and the reason appears to be that these are choses-in-action and are parcel of the personal estate in respect of which the executor or administrator represents the person of the testator and is in law the testator's assignee".

The Indian Contract Act does not contain any rules as to the extent to which person other than the original promisee may become entitled to sue. Generally, the representatives of a deceased person may enforce subsisting contracts with him for the benefit of the estate.[95] ""It is no real exception to this rule that in some cases the nature of the contract is, in itself, or may be made by the intention of the parties such, that the obligation is determined by the death of the promise. The most obvious instance is the contract to marry in the common law. Another seeming than real exception is where performance by the deceased was not completed in his lifetime, and is of such a personal character that performance by his representatives cannot be equivalent...." It is to be remembered that all parties of the kind are in aid

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94 *Raymond v. Fitch,* (1835) 5 L.J. Ex. 45.

95 Pollock and Mulla's *Contract Act*, 6th Edn., p. 261.

of the presumed intention of the parties and if rules have expressed a special intention, it must prevail.[96]

But it may be stated, as an elementary proposition, that if moneys had been earned and had accrued due to the deceased, though for service of a confidential and personal kind, they are part of his estate and his representatives succeed to his right of action to recover them.[97] So, too, in the case of conventional damages or penalties, that is to say, damages which have been stipulated or agreed upon during the person's lifetime as compensation for a breach of contract of a purely personal nature, or for personal injuries arising from negligence in the performance of a contract, the right to sue can be availed of by the representatives.[98]

5.10.8 Suit for damages by minor:

The question whether a minor can sue for damages for breach of a contract entered into by him or by his guardian presents some difficulty. The leading case of *Mohori Bibi v. Dharmodas Ghose*,[99] decided by the Privy Council, has deninitely established that an infant cannot be enforced against him. But the converse, namely, whether an infant, being a promise, can sue the promisor for breach of the agreement must, it is submitted, depend upon the further questions, whether the whole of the consideration purporting to have been received from the minor has been executed an there remains no obligation on his part to perform any outstanding part of the contract, and whether the agreement is for the benefit, of the minor. Where, for

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96 Pollock and Mulla's *Contract Act,* 6th Edn., p. 261.
97 *Stubbs v. Holy Well Ry. Co.,* (1867) 2 Exh. 311.
98 *Beckham v. Drake,* (1849) 2 H.L.C. 579 : 81 R.R. 329.
99 *Mohori Bibi v. Dharmodas Ghose,* I.L.R. 30 Cal. 539.

instance, the whole of the consideration has been received from the minor and the benefit of it has been enjoyed by the promisor, and where all that remains to be done is purely for the benefit of the minor, it appears to be opposed to natural reason and justice to refuse to allow him to sue. On the other side, to allow the promisor to bring into question the validity of the transaction in respect of which he has received the full consideration is totally to subvert the ends of justice. As has been observed in a well-known work on contracts, "infancy is a personal privilege of which no one can take advantage but the infant himself; and, therefore, although the infant may repudiate his contract, it binds the other party. Indeed, were it otherwise, the infant's incapacity, instead of being an advantage to him, might in many cases turn greatly to his detriment."[100]

The question was the subject of a Full Bench decision of the Madras High Court in *Raghavachariar v. Srinivasa Raghavachariar,*[101] in which after a very elaborate discussion it was held that a minor can sue for the enforcement of a mortgage executed in his favour if the mortgage has received the consideration. In an earlier case in the same court, it was held that a minor can be the payee under a promissory note and can sue to recover the money due thereunder.[102] It has to be noted that there is nothing in the Indian Contract Act which prevents a minor from being the promise under a contract and if a minor, at the request of the promisor, pays money, or does some service or refrains from doing any act whether it is of value or not, that would be sufficient consideration for the promise which can

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100 Chitty on *Contract*, 18th Edn., p. 182.

101 *Raghavachariar v. Srinivasa Raghavachariar,* 31 M.I.J. 575 : I.L.R. 4 Mad. 308.

102 *Setharazu v. Basappa,* 24 M.L.J. 363 : 18 I.C. 968; *Bhola Ram v. Bhagat Ram,* AIR 1927 Lah. 24 at p. 27.

be enforced by the minor by way of damages or by specific performance. If, for instance, a minor engages himself as a servant and performs the service, he can certainly sue for the wages due to him. So also, a minor may sue an adult person for breach of the promise of marriage[103] although the adult cannot sue the minor on such a promise.[104] These principles were applied in a recent case in Bombay high Court in which it was held that the minor was entitled to maintain the suit for damages for breach of a contract of marriage made by the minor's father during his or her minority. The court in that case, recognized the right of the father or other guardian of a minor to enter into a contract of apprenticeship or marriage, both of them being for the benefit of the minor, and observed, that "neither a contract for personal service nor a contract of marriage can be ordered to be specifically performed so that, in either case, the apprentice or the girl cannot be compelled to carry out his or her part of a contract against his or her wishes. However, if it is an enforceable contract, the other result, namely, the liability in damages, of the party making the breach of the contract would follow." [105]

5.10.9 Suit for damages by and against lunatics:

As far as contractual obligations are concerned, decision taken by the Privy Council in the case of *Mohori Bibi v. Dharmodar Ghoshe*[106] is like a complete code in its own self. According to the terms of the Indian Contract Act, the rule of law applicable to minor is also applicable lunatics and other persons of unsound mind. It was held in a very loud

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103 *Holt v. Ward,* (1732) 93 E.R. 954.
104 *Hale v. Ruthven,* (1869) 20 T.L.R. 404.
105 *Fernandez v. Gonsalves,* AIR 1925 Bom. 97: I.L.R. 48 Bom. 673.
106 *Mohori Bibi v. Dharmodar Ghoshe,* I.L.R. 30 Cal. 539.

and clear voice by the Hon'ble Madras High Court in the case of *Machaima v. Usman Beari*[107] that a contract with a lunatic is void and an unforeseeable. It would also seen that the same rule of law which enables a minor who sue for the benefit arising out of a contract with an adult, where the consideration has been executed and / or that remains to be done by the adult has been left unperformed, will also enable a lunatic or other person of unsound mind, to claim the relief which a minor is allowed to receive. There are certain persons, who, though they have no beneficial interest in the contract, by virtue of that legal position, some time allows to sue upon it.

5.10.10 Suit for damages by an agent:

An agent is person employed to do any act for another or to represent another in dealings with third persons. The principal is the real party to the contract, and the person really interested in its performance; as such, the right of action is really in the principal. But the agency is coupled with the interest, that is to say, when the agent is made a contract in the subject matter of breach, he has special property or interest he may, even though he contracted for an avowed principal, sue in his own name. Hon'ble Madras High Court in the case of *Subramanya v. Narayanan,*[108] has observed that where an agent enters into a contract, as such, if he has an interest in the contract, he may file a suit to claim damages for breach of contract in his own name. This no doubt is not an exception to the general rule stated above, for the agent in such a case is virtually a principal to

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107 *Machaima v. Usman Beari,* 17 M.L.J. 78; *Kamala Ram v. Kanza Khan,* 1812 P.R. 41.

108 *Subramanya v. Narayanan,* I.L.R. 24 Mad. 130; *Coorla Spinning and Weaving Mills Co. Ltd. v. Vallabhadas kalianji,* AIR 1925 Bom. 547 at p. 558.

the extent of his interest. But, where the plaintiff's purported to act under a contract with the defendant as broker for the sale and purchase of goods, but really acted on their own account as principles without the knowledge and consent of the defendant, it was held that they were not entitled to recover damages for the latter's breach of contract.[109]

In some forms of contract, as, for instance, in *F.O.B.* (Free On Board) contracts, an agent stands in the position of principal, although he was acting as agent for an up-country purchaser. A right of action for damages arises in his favour, if the seller with whom he contracts to purchase for his constituents fails to perform the contract.[110]

5.10.11 Suit for damages by benamidar:

The general right of the benamidar to sue, without the concurrence of the real owner, upon contracts, entered into in his name has been recognized by the Privy Council.[111] The fact that he is a mere name lender with no interest in the property might generally be taken to negative his liability. But the benamidar might so conduct himself in the transaction that he is looked upon as one of the actual contracting parties liable to be sued for breach of any of its terms. Thus a benami-holder of immovable property who executes and signs a sale-deed in respect of it along with the real owner, was also held liable to the purchaser under an express unqualified covenant for quiet enjoyment contained in the deed. Where a Kobala was entered into,

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109 *Sewdutt Roy Maskara v. Nahapit,* I.L.R. 34 Cal. 628.

110 *Girija Prasad v. National Coal Co.,* AIR 1949 Cal. 472 at pp. 476, 477; *Krishun Das v. Ganesh Ram,* AIR 1950 Pat. 481 at pp. 482, 483.

111 *Gurunarayanan v. Sheolal Singh,* I.L.R. 46 Cal. 566 : 49 I.C. 1; *Maung San Da v. Maung Chang Tha,* AIR 1930 Rang 130 at p. 131.

with the plaintiff by a Hindu widow as vendor, and it was perfectly consistent with her being a benamidar for her sons, the real vendors, who actually received the consideration which was to be returned to the purchaser in a given event, and also consistent with the allegations in the plaint that her sons caused her to enter into it on their behalf, it was held that the plaintiff was entitled to sue the benamidar and the real owner for return of the purchase money on the happening of an event mentioned in the Kobala.[112]

5.10.12 Suit for damages by official assignee and receiver:

Where the commission of the breach of contract results in injuries both to the property and to the person, the official assignee or receiver can file a suit for such damages under the heading, "suit for damages for breach of contract" for the damages caused to the property or to the person and such right of action will be split up between the official assignee or receiver and the insolvent, where, however, personal qualifications to be exercised by the insolvent from the material considerations in a contract, it is not assignable in law and so the official assignee or receiver is not entitled to ask for its performance or sue for its breach.[113] But if the breach of such a contract has occurred before the insolvency, the official assignee or receiver is entitled to sue for damages thereof.[114]

The cases in which a discharged insolvent is entitled to sue for damages in his own name have been succinctly set out as follows:

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112 *Bishoswari Debya v. Govind Pershad Tewari,* 26 W.R. 32.
113 *Baily v. Thompson & Co.,* (1903) 1 K.B. 137.
114 *Beckham v. Drake,* (1849) 2 H.L.C. 579.

(1) For damages in respect of a breach of contract resulting an injury exclusively to his property or person.

(2) Where a breach of contract results in injuries both to the property and person, for damages for injury to his person.

(3) For damages for breach after insolvency, of a contract for personal service made before insolvency and remaining unexecuted at the date of insolvency.

5.10.13 Suit for damages by executors and administrators:

As regards the right to sue which vests in an executor or administrator, reference may be made to Sec.306 of the Indian Succession Act,[115] which says that all demands whatsoever existing in favour of a person at the time of his death survive to his executors and administrators, except causes of action for defamation, assault, or other personal injuries where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory. So a cause of action for damages for injuries of a purely personal nature, though arising out of a breach of contract cannot be sued upon by the executor or administrator. Similarly, a right to sue for damages for personal injuries caused by the executor or administrator. Barring the above and similar cases where the injury is of a purely personal nature, the executor or administrator can sue for recovering damages in all other cases of breach of contract.

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115 *H.S. Gambhir v. Vam Dev Sharda,* (1991) 1 A.C.C. 162 at p. 163 (P. & H.)

5.10.14 Suit for damages by parties and legal representatives:

The general rule may be stated to be that whoever is bound to perform a contract, but fails to do it commits a breach thereof and is liable to compensate the other party entitled to enforce it. Ordinarily, a person not a party to the contract ought not to be brought before the Court. Therefore, firstly, either party to the contract may figure as the defendant, and secondly, in the event of his death, his heir, legal representative, executor or administrator and assignee.[116] As regards the latter class of persons, the recognized exception is that if the contract involves the skill or other personal qualifications of the defaulting party, his heirs, legal representatives, executors and administrators will not be held liable for such default.

5.10.15 Suit for damages by strangers to the contract:

A contract does not create a right or liability in a person who is not a party or privy to it, unless he claims or be charged through a party, as in the case of cestui que trust claiming through the trustee.[117] In other words, a person who is not a party to a contract is not liable thereon. So, an agreement between a mortgage and a purchaser of a portion of the equity of redemption, with regard to the consideration money left with the latter, was held not binding on the vendor-mortgagor. If a third person admittedly received rent due to a landlord from his tenant,

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116 Vide Sec. 27 Cls. 9a) and (b) of the Specific Relief Act 91 of 1877); now Specific Relief Act, 1963.

117 *Kherode Behari Gossami v. Narendralal Khan,* 55 I.C. 310.

such person cannot be sued for the amount collected as money received for the use of the plaintiff. Again, where rights under a usufructuary mortgage were sold away by a person jointly entitled with another with whom there was an agreement to sell away such rights, and the purchaser allowed redemption of the mortgage rights by receiving a certain amount, it was held that the joint mortgage cannot sue the purchaser upon the agreement and claim from him the amount he received in allowing redemption of the mortgage.

5.10.16 Expenditure incurred by third party when plaintiff entitled to recover amount:

A plaintiff is only entitled to recover the amount of expenditure incurred or loss sustained by a third party, first, if he, the plaintiff, is under a legal liability to this third party in respect of that expenditure or loss, and, secondly, if it was reasonable for that expenditure to have been incurred or that loss to have been sustained.

5.11 CONCLUSION:

It was the say of Thesiger, L.J. in *Hiort v. London and North Western Ry. Co.*[118] "the unauthorized act, whether it be a conversion or whether it be a breach of contract or breach of duty did vest a right of action and for this reason, that the law presumes a damages in respect of that unlawful act." So, in an action a surety where the creditor was found to have made advances to the principal debtor, which he was not bound to mark, it was held, that the creditor was not entitled to anything more than nominal damages. So

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[118] *Hiort v. London and North Western Ry. Co.,* (1879) 4 Exh. D. 188.

also in an action on the case against the secretary of an insurance company, for false representation as to the management and affairs of the company, whereby the plaintiffs was induced to effect an insurance with it the Court awarded nominal damages though it did not appear that he had sustained any positive loss.[119] The rule that every injury imposes damages is under English Law and very widely accepted in case if the action is based upon a contract. It was on and often says that every breach of duty arising out of a contract given rise to an action for damages without proof of actual loss.

While making comparative study between English Law and Indian Law on the subject of damages for breach of contract the researcher found that the rule in India on aforesaid subject is entirely different. In India, there is nothing like recovery of nominal damages in actions for breach of contract.[120] It is to be observed that failure, by itself, to perform a contract would not result in damages, for it is open to the plaintiff, if he could, to obtain the result which eh expected from the defendant's performance of contract by other means which an ordinary prudent man would adopt.[121] If upon doing so the plaintiff finds he has suffered no actual loss by the defendant's failure. In all such cases, the court inquires whether the party complaining of the breach has suffered any damage and if so, what is the extent of the damage, and if the court finds that no damage has actually resulted from the breach it will refuse to give any relief. Where the defendants engaged to serve the plaintiffs in India for a specified period, undertook to return

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119 *Warren v. Calvert,* (1837) 7 Ad. & El. 143.

120 *Pontifix v. Bignold,* (1841) 3 M. & G. 63.

121 *Gedehal Karibashavana Gowda v. Nandavaram Veerabhadrappa,* I.L.R. 36 Mad. 580 : 16 I.C. 14 : 25 M.L.J. 3.

to England on the termination of service, but stayed on at Madras in breach of the covenant, it was held, that the mere fact that the defendants stayed on, though constituting a breach of agreement, could have caused no damages to the plaintiffs and as such the plaintiffs' action must fail.[122] So also in a case where the purchaser sued the vendor for damages for non-delivery at the appointed date, of goods agreed to be sold to him, and where the price of the goods had fallen on the due date, it was held the plaintiff, instead of being a sufferer from the breach of the agreement, was actually a gainer, and that he was not entitled to nominal damages.[123] The Court pointed out that Sec. 73 of the Indian Contract Act of 1872, which contains the rule of damages for breach of contracts, lays down, that where a contract has been broken, the party who suffered by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby. It appears, therefore, that Sec. 73 makes it compulsory on the plaintiff to show that he has suffered and to what extent he has suffered. Knight, J., observed in *P.R. & Co. v. Ghagwan Dass*[124] : "I am convinced that the Indian Act does not sanction or permit an action for breach of contract save where specific damage is proved to have resulted from the breach." It has, therefore, been held that though every breach of duty arising out of a contract gives rise to an action for damages without proof of actual damage, the amount of damages recoverable is, as a general rule, governed by the extent of the actual damage sustained in consequence of the defendant's act.[125] The

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122 *Oakes & Co. v. Jackson*, I.L.R. 1 Mad. 134.

123 *Banarasi Dass & Co. v. Lulla Mull,* 29 I.C. 950.

124 *P.R. & Co. v. Ghagwan Dass,* 10 Bom. L.R. 1113, reversed in I.L.R. 34 Bom. 192 on another point.

125 *Frederick Thomas Kingsley v. Secretary of State*, AIR 1923 Cal. 49 at p. 50.

rule, however, appears to be different in cases falling under Sec. 74 of the Indian Contact Act. It is enacted that “when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach …….. the party complaining of the breach is entitled whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named ... ...” Where, therefore, the parties have been careful enough to fix any particular amount in the contract itself to be paid in case of breach, the stricter rule under Sec. 73 of the Indian Contract Act cannot apply. So it was held that under Sec. 74 a party complaining of the breach of contract is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive reasonable compensation and the defendant in the action cannot plead or take advantage of the admission of the plaintiff that he did not suffer any loss or damage from the breach.[126]

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126 *Meyappa Chetty v. Nachammal Achi,* 123 I.C. 343 : AIR 1929 Mad. 783 at p. 784.

CHAPTER - VI

ORIGIN AND HISTORY OF THE TERM DAMAGES

6.1 INTRODUCTION:

Any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another is entitled to a pecuniary compensation or indemnity. Such compensation or indemnity may be recovered in the Courts by any person who is a sufferer.

In the decision of *A.S.Sharma v. Union of India*,[1] the Gujarat High Court has given very simple meaning to word 'damages'. 'Damages' are simply a sum of money given as a compensation for loss or harm of any kind.

The definition given in the aforesaid judgment sounds quite simple to understand the entire concept but to derive at such a level of simplicity the system, the framers of law, Jurist, Juries, decision making authorities and Judges have to pass through rocky roads. The original law of damages have its roots in a long past and the best study on any subject in the world can be made by getting an idea about it's origin. The scope of the history and development of remedies for injuries and wrongs in the various system of jurisprudence is beyond. But in brief it may be described the earlier forms of remedies recognized by the three principal system of jurisprudence that have developed quite independently of one another known as, namely, The Hindu,

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1 *A.S. Sharma v. Union of India,* 1995 ACJ 493 at 498 (Gujarat).

The Mohammedan, and The English System. Thus, the origin of law of damages is found in all the three oldest legal system in the world. Those three systems are namely:

(i) Hindu jurisprudence
(ii) Mohammedan jurisprudence and
(iii) English jurisprudence.

6.2 HINDU JURISPRUDENCE:

The oldest of the three systems is that of the Hindus. Vedas constitute the earlier sources of laws which govern the Hindus is now established beyond doubt. "According to the Law Books the Vedas should be regarded as the first and foremost source of Dharma. They are, therefore, frequently quoted, specially in the *Dharmashastra* which generally follow the Vedas very closely and may, on the whole, be regarded as the oldest sources of Law", According to Processor Jolly in his Hindu Law and Custom.[2] The *Smritis* or *Dharshastras* constitute the second source of Hindu Law and with the numerous commentaries of latter period which are helpful in the understanding of the *Smritis*, they from the entire fabric upon which the Hindu System of jurisprudence was built. From a study of the above authoritative work it is evident that the Hindu Law has a gradual growth varying from time to time according to the needs and exigencies of the society.[3] "Hindu Jurists at a very remote period laid down eighteen divisions of subjects and treated of law under what are called the eighteen topics of legislation. These eighteen topics are again sub divided

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2 Jolly's *Hindu Law and Custom* translated by Balakrishna Ghose, Ch.I, Art.I, p. 1.

3 C.Kameshwara Rao, (2005), 6th Edition, Vol.I , *Law of Damages and Compensation*, p.2, Law Publishers (India) Pvt. Ltd.

into One hundred thirty two sub divisions and included every possible form of legal relations that arises in the Hindu Society. The divisions which have direct bearing on the subject of the present work being breach of contract, debt, deposit or pledge, sales and their rescission, master and servant, trespass, personal violence including assault, deceit, adultery, theft, nonpayment of wages, and dispute between owners of cattle and herdsmen".[4] It will be found on reference to *Narada*, that in all the above actions at Law payment of damages and compensation were among the recognized form of remedies available to the injured party. "The obligation to pay compensation for every kind of injury is recognized in the fullest extent and the evidence for it may also be found in what has been stated above".[5] Thus, the whole scheme of the Hindu Jurists, therefore, appears to be to provide for payment of damages and compensation for infringement of all kind of legal rights, including rights *ex-contractu* as well as for injuries arising independently of contract and also to regulate the payment of such compensation by reference to a fixed scale, varying according to the nature, extent, gravity of the injury and the animus to the wrongdoer.

6.3 MOHAMMEDAN JURISPRUDENCE:

In Mohammedan jurisprudence also we find that it has gone almost through the same stage of development and grown up in the same manner as any other legal system. The juristic system of the *Mussalamans* had its origin in Arabia,

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4 Acharya's Commentaries on *Narada; Golab Chandra Sarkar Sastry,* Hindu Law, Ch. I. pp 42, 43; H.C. *Ghose, Principles of Hindu Law,* Ch.I, pp.6,7.

5 Quoting from Vishnu (vi.5,51,59,75,100 to 109).

and has been developed by Arab Jurists. The original sources of Arabic Law or the usage or customs of the people and the Laws, which govern their society, bear the distinct impress of their nomadic habits. It was Mohammed, the great prophet of God who began to promulgate the principles of Islam and preach them "not merely for the municipal Government of the Arabs, but for the guidance of men's lives generally". When the laws of Islam came into force, the constitution of Arabs society was that of a people which had not yet completely lost its nomadic habits and characteristics. It must have given immense difficulty to the prophet to inculcate into the minds of such a people, the ideas of right and wrong as adumbrated in his teachings. [6] After the death of prophet *Mohammed* the two schools of Mohammedan Law came into existence known as *Sunni & Shiah*. *Sunni* school of Mohammedan Law was further divided into four different schools. But, so far as the principles of law or jurisprudence are concerned, there does not appear to be much difference among these sub divisions or even between the two original systems or school of Mohammedan Law.

- **Comparison or similarity in the two schools of thought:**

Like Hindu Jurists, Mohammedan Jurists also divide rights under different head. Mohammedan Jurists divide rights under two broad head; 1) Public, 2) Private. Public right is famously known as right of God, which is totally different from private right, which is known as right of man. Enforcement of public right was the duty of the State as the said right a right provided by the God. While in the case of

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[6] Abdur Rahim's, *Mohammedan Jurisprudence*, Ch.I, Sec.1, p.2.

an infringement of a private right, the enforcement is left to the option of the individual affected. These rights have been further classified by the Mohammedan Jurists into four sub divisions. One of them is damages or compensation for breach of contract. The said right is governed under a head "Matters in which rights of individuals only are concerned, are private rights pure and simple, e.g. enforcement of contracts, right to protect one's person and property. The enforcement of such rights is the concern of the individual who is injured and he is permitted to condone or compound the injury".[7] From the above brief discussion, it is crystal clear that the remedial rights propounded in the Mohammedan jurisprudence differ in some particulars from those obtaining in Hindu Jurisprudence because Mr. Abdur Rahim divides private rights into six heads: (1) right to safety or person, (2) right to reputation (according to *Shafeis*), (3) right to ownership, (4) family right, (5) rights to do lawful act, and (6) rights *ex-contractu*.[8] But from the point of view of their origin obligations may, according to him, be classified as those arising (1) by implication of law, (2) out of man's own act of utterance, i.e. rights *ex-contractu,* etc. (3) by reason of conduct infringing another's right.[9] In the matter of the enforcement of these obligations, Mohammedan law recognizes two distinct remedies, viz. specific and non-specific. The principle underlying the non-specific remedy is that wherever it is not possible to discharge the obligation "by means of something which is intelligibly similar to the subject-matter of suit both in appearance and in essence, the law will be satisfied with something which is similar in essence such as payment of

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7 C.Kameshwara Rao, (2005), 6th Edition, Vol.I, *Law of Damages and Compensation,* p.4, Law Publishers (India) Pvt. Ltd.

8 Abdur Rahim's *Mohammedan Jurisprudence,* p.206.

9 Abdur Rahim's *Mohammedan Jurisprudence,* p.207.

the price of an article which has been misappropriated". In other words payment of compensation is allowed in all cases where specific performance is not possible, and the amount of compensation seems in many cases to be fixed and determined. In the case of wrongs independent of contract the Mohammedan law again recognizes three distinct remedies: (1) relation, (2) compensation, and (3) restitution, "The remedies recognized by the Mohammedan law are retaliation and compensation in cases of infringement of a man's right to the safety of the person; and restitution and compensation are the remedies provided for the violation of a man's property rights and for other wrongs of a similar character".[10]

6.4 ENGLISH JURISPRUDENCE:

Amongst the above three English system of jurisprudence is lastly developed jurisprudence. Though it has evolved out of the old Anglo-Saxon jurisprudence it is not difficult to trace in its development the influence of the Roman law. Meaning thereby English system of jurisprudence provides a developed legal system, which is highly influenced by Roman law. In fact, the entire Civil law of modern Europe has its root and foundation upon the principles of Roman jurisprudence. The old Anglo-Saxon laws of Kind Ethelbert deal almost exclusively with wrongs resembling our modern "Breach" and rules have been carefully framed for the payment of were or compensation in money value, by way of

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[10] Abdur Rahim's *Mohammedan Jurisprudence,* p.358.

damages.[11] Sedgwick in his treaties on the measures of damages while discussing the history of this branch of law referred to the various kinds of wrongs which the old *Anglo-Saxon* law dealt with, together with and the fixed amount of compensation in money value, payable for each wrong. The law of the subsequent *Anglo-Saxon* monarchs also recognize the application of the were and that among the law of King Alfred there appears a more minute classification of wrongs and the remedies for their redress, but in the laws of William the Conqueror the *weres* become very few. It is no doubt an interesting study to tract the precise time in the history of this branch of law, at which the *weres* were completely abolished and in their stead the rule was laid down that compensation payable to the injured party has to be ascertained by the Court. Sedgwick while remarking upon the fact the *weres* became very few in the law of William the Conqueror, says: "Perhaps this is evidence of a civilization gradually increasing and a jurisprudence slowly improving; for feeble certainly, and unreliable, must be the tribunal charged with the task of imposing damages in civil suits, if the legislature considers it unsafe to be trusted with the assessment of the amount. This elaborate and minute specification, therefore, though on its face it appears to indicate the case and watchfulness of the lawgiver, on a closer examination furnishes stronger proof of the distrust of the judiciary. Arbitrary rules which do not bend to the justice of the particular matter, especially when used to fixed values, are always a misfortune and defect in jurisprudence".[12] This is perhaps true to some extent, but the learned author ignored one

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11 C.Kameshwara Rao, (2005), 6th Edition, Vol.I, *Law of Damages and Compensation,* p.5, Law Publishers (India) Pvt. Ltd.

12 Sedgwick, *Damages,* 9th Edn., Ch.I, pp. 8-9.

obvious advantage in having a fixed scale of compensation payable for each wrong. Instead of leaving both the wrongdoer and the injured in doubt because of the uncertainty of the amount, either party was made to know before hand what by way of damages to expect. We have known that Courts of law are but imperfect agents and in very few cases have they succeeded in correctly estimating the amount of damages payable in redress of wrongs. It is only on the principle of approximation or what is better termed as "as nearly as may be" that the amount of damages is fixed by Courts of law, and we may be sure that neither the plaintiff nor defendant ever went satisfied with the value as found by the Court. Moreover, it is not too much to asset that this very uncertainty itself has been the effective cause of protracting every action in which the question of damages came to be litigated.[13]

It is, however, certain that the common Law of England whose characteristic is mainly remedial, as distinguished from preventive, and whose remedies are of a pecuniary description always aimed at the payment of compensation to the injured party proportionate to the actual loss sustained in all cases of civil injury or breach of contract. But in cases where the elements of fraud, oppression, malice or gross negligence are found, it did not confine its remedy to the payment of compensation merely proportionate, but granted vindictive or exemplary damages by way of punishment to the wrong-doer. "The common law", says Sedgwic "as it exists in England, and as it was introduced into the United States, is generally remedial in character

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[13] C.Kameshwara Rao, (2005), 6th Edition, Vol.I, *Law of Damages and Compensation,* p.5, Law Publishers (India) Pvt. Ltd.

and its remedies are of a pecuniary description. It has few preventive powers, it can rarely compel the performance of contracts specifically, its relief for the most part, consists in the award of pecuniary damages. Whether it punishes wrongs or remunerates for breach of contract, in either case, its judgement simply makes compensation, by awarding a certain amount of money by way of damage to the sufferer".[14] To the Indian student of law and to the practical lawyer, the old distinction between common law and equity is of little interest, except perhaps historically, and it is sufficient for our present purposes to state that after the passing of what is known as Sir Hugh Cairns Act[15] the blending of the two systems slowly took place and the Court of Chancery was authorized by the Legislature to award damages to the injured party either in addition to or in substitution for the relief of injunction or specific performance. The Judicature Act of 1873, however, affected a complete union of the common law and equity into a single harmonious system of general law administered in English Courts. Prior to the passing of the Act the plaintiff, in an action founded upon contract, covenant or other agreement could only claim and the Court could only award a certain sum of money by way of compensation for the breach of the agreement.

From the aforesaid brief discussion of the three systems it is apparent that they agree upon the basic principle of the right to recover compensation by way of damages for wrongs of all the nature or for breach of contract. The

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14 Sedgwick, *Damages,* 9th Edn. Ch.I, p.8 Art. 9.

15 Sir Hugh Cairns Act, 21 and 22 Vict. Ch.27.

amount of compensation payable to the injured is almost in every case fixed and predetermined and "just and reasonable" according to the values of money and things prevalent in each society. Moreover, with the advancement of civilization, the ideas of right and wrong grew more, refined more, developed more, and accordingly the fixity of the scale of compensation was gradually abolished leading the assessment of the amount payable in each case to the "fluctuating" discretion of either Judge or Jury.

6.5 "DAMAGES": HISTORY OF THE CONCEPT IN A MIDDLE AGE

Having gone to the abovementioned three systems, it will be worthwhile to mention the ideas of famous law thinkers on damages during the middle ages. In the words of Hallam observed:

"The passion of revenge always among the most ungovernable in human nature acts with such violence upon barbarians that it is utterly beyond the control of their imperfect arrangements of polity. It seems to them o part of the social compact to sacrifice the privileges which nature has placed in the arm of valour; gradually, however, these fiercer feelings are blunted and other passion hardly less powerful than resentment is brought to play in a contrary direction."[16]

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[16] Hallam on Middle Age, Volume I, p.154, Ch. II, pt.II.

6.6 "DAMAGES": HISTORY OF THE CONCEPT IN A MODERN TIME

The modern thinker Blackstone also gives an idea about the law of damages, which is similar to the views taken by the ancient law thinker and middle age authors.

Blackstone shares the similar view in his own words. Blackstone in his commentary says[17] "the primary right to a satisfaction for injuries is given by the law of the nature,", and this right to receive satisfaction is based upon the sanctity of individual rights which humanity has always been from its infancy jealousy protecting from being wantonly violated. This natural right was early discovered to be essential to the growth and wellbeing of the society, and during the successive stages of civilization and refinement, various means were devised to enforce the same. In the ruder ages when the appeal to arms was the only mode of redress for wrongs, the old barbaric notion of "an eye for an eye, a tooth for a tooth" became almost a law. Indeed, instances are not wanting in the history of man where a person robbed of his wife was held to have a natural right to carry off the wife of the offender or a person robbed of his chattels was entitled to rob the thief in turn or where even in case of a murder, the heirs of the murdered man were held entitled to take the life of the murderer. Though this form of obtaining satisfaction had its origin in the passion of revenge always so prominent in nature, the basic principle appears to be nothing but the right to obtain, reparation for the wrong or injury. However as ideas of refinement began to develop, and peace and progress came to be valued, it

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[17] Blckstone, *Law of Damages,* Book II, Ch. 29, p. 438.

had to be recognized, that this form of reparation is not consistent with tranquility, progress and social organization."

With day by day increase of commerce, with the advance of society and the varied activities of national and social intercourse, the history of human relations assumed such a complexity as to exercise the minds of the ancient lawgivers to evolve new rules for regulating the remedies consonant with the changing ideas of right and wrong. The earlier object of jurisprudence is, therefore, as Hallam says, "to establish a fixed, atonement for injuries as much for the preservation of tranquility as the prevention of crime." It is beyond the scope of the present work to trace the comparative history and development of the injuries or wrong in the various systems of jurisprudence known to us. Suffice it to say that all the several legal systems which govern the civilized nations of the world agree upon the basic principle of a natural right to obtain reparation for wrongs or infringement of rights, and that the reparation or satisfaction which the law allows must be in the nature of compensation proportionate to the injury inflicted. We shall however briefly advert to the earlier forms of remedies recognized by the three principal systems of jurisprudence with which we are mostly concerned and which have developed quite independently of one another.

6.7 ANGLO-INDIAN JURISPRUDENCE:

The first and foremost important step in the development of modern law of damages is the development of Anglo Indian Jurisprudence. This is the most interesting branch to study

branch of law for the Indian student. It is always interesting to learn how and in what way this branch of law has developed under the influence of what may be called Anglo-Indian Jurisprudence. In *Ram Koomar Condoo v. Chandra Kanta Mookerjee*,[18] it is observed that "the establishment of British Courts in India has superseded the old Hind Tribunals for the administration of justice and rules of the common law of England regarding wrongs and their remedies were freely applied to cases arising in this country, So far as they are found to be based upon nature, reason and justice and not opposed to or inconsistent with the principles of Hindu and Mohammedan jurisprudence. English Judges, presiding in our Courts, have faithfully tired to follow the rules of the common law of India in all cases that arose for decision before them. For instance the English laws of *Champerty* and maintenance were totally rejected by Indian Courts and in its stead have introduced the more equitable principle of reasonableness of the transaction and freedom from fraud according to the general principles of the law of contracts." Indeed, instances can be multiplied wherein English Judges have strictly adhered to the rules of Indian Common Law. But, still in some more important matters, in their anxiety to do justice between man and man, they allowed themselves to be slowly and unconsciously influenced by the technical doctrines of English law and have, by a process of reasoning strictly applicable to the English conditions of society laid down a law (in spite of the feeble attempts of India Judges to the contrary) which has in many instances done more harm than it was expected to cure. Again the strict application of the maxim action *personalis moritur* cum persona though with

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[18] *Ram Koomar Condoo v. Chandra Kanta Mookerjee,* I.L.R. 2 Cal. 233.

some notable exceptions is another instance in which mischief is being done in the name of law.[19] So also the rule that a person has no cause of action at law for a libel on his ancestors is another instance of the mischievous application of the English doctrine. It may also be noticed that the maxim rex non protest peccary (the King can do no wrong) is entirely foreign to the Hindu system of jurisprudence which does not recognize the immunity of the King or his officers in respect of wrongs committed against the subjects. These and similar instances, therefore, still require to be reconsidered in the light of the Indian conditions of life and society. But on the whole the general influence of English Judges sitting in our Courts may unhesitatingly be said to be most beneficial to the interests of a more humane system of jurisprudence. More especially in the domain of the Law of Damages the old system of adopting fixed value in the matter of the award of compensation for injury has been abrogated and the assessment of the amount of compensation on juristic principles has been allowed to be applied.[20]

Thus, the Anglo Indian Jurisprudence can be termed as extremely good combination of all the three oldest legal system of the world. We can say that this is one of the most developed, established and stable legal system of law.

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19 *Bhupendra Narayan Sinha v. Chandramoni Gupta,* AIR 1927 Cal. 277.

20 *Alwar Chetty v. Vaidyalingam Chetty,* 1 M.H.C.R.9.

6.8 CODIFICATION OF LAW: CHARTER OF 1726 A.D.:

➢ India governed by English Law:

The indiscriminate application of English law to Indians, within the jurisdiction of the Presidency towns, by virtue of the Charter of 1726,[21] led to so many inconveniences, that the British Parliament passed two Statutes 22 Geo. III, Ch. 70, Sections 17 and 3; Geo. III, Ch. 142, Sec. 13, whereby English law was superseded and the personal laws of Hindus and Mohammedans were declared to be applicable in matters of inheritance, succession, contact or dealing between party and party. So far as the *mofussil* is concerned the rule has always been to act according to justice, equity and good conscience, in the absence of specific enactment. And this rule of justice, equity and good conscience has been interpreted to mean, the rules of English law so far as they are applicable to Indian conditions.[22] The passing of the Indian Contract Act put an end to this anomaly of administering justice in India by the application of the English Statutory and Common Law of Damages and Compensation is concerned Sections 73 and 74 contain definite rules for assessing the amount of damages and compensation to be paid upon a breach of contract. But in the case of civil wrong, there is no legislative enactment laying down rules for the measure of damages and compensation payable to the injured party and the principle which guide the Courts in estimating the

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21 Charter of 1726, 13 Geo.1.

22 *Waghela Raj Sanji v. Seikh Masludin,* I.L.R. 11 Bom. 551 at p. 561; *Dada v. Babaji,* 2 Bom. H.C.R. 36 at p. 38; *Webb v. Lestur,* 2 Bom. HC.R. 52 at p. 56; 59I.C. 143 : 28 I..C. 349.

measure of damages, are more or less drawn from the rules of English Common Law. [23]

In the landmark decision of *Sundarmul v. Ladhuram,*[24] Justice Page of Calcutta High Court has observed "The Common Law of England except where it has been abrogated by legislative enactments and in so far as it is not inapplicable to Indian conditions is part of the Law of India". In *Vitappa Kudua v. Durgamma,*[25] the Madras High Court has held that "if there was no provision in the Legislature of this country and if they were to apply the principles of justice, equity and good conscience, they were not at liberty to whittle away the force of rules of English law as proposed by eminent Judges and substitute for it something which, in their opinion, should be regarded as a rule of equity in this country. They thought that if the rules of English law afford any ground for the application of the principles of equity, justice and good conscience that should be applied mutatis mutandis, without presuming to deduce a new rule from it." But this expression of opinion by the Madras High Court appears to have gone too far in applying the principles of English law irrespective of the question whether those rules apply to the peculiar conditions in India and to the circumstances of the case. Where, however, the principles of the Common Law in England are in a state of uncertainty there is nothing to preclude High Courts in India applying that view of the law, which is essentially just and equitable.[26] In one of the leading case Stone, CJ while considering the applicability of f common law observed that; "In considering what is today

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23 Indian Contract Act IX of 1872.

24 *Sundaramul v. Ladhuram,* AIR 1924 Cal. 240 at p. 242.

25 *Vittappa Kudua v. Durgamma,* 55 I.C. 781.

26 *Balammal v. Palaniandi,* AI.R 1938 Mad. 164 at p. 170 : (1938) 2 M.L.J. 340.

consonant to justice, equity and good conscience, one should regard the law as it is in England today, and not what was part of the law of England yesterday. One cannot take the Common Law of England divorced from the Statute Law of England and argue that the former is in accordance with justice, equity and good conscience and the latter which has modified it has to be ignored today. The relevance of English Common Law is that it affords a guidance in connection with the rest of English law as to what rule is consonant to justice, equity and good conscience, judged not according to circumstances in England, judged not according to the date when the rule was enunciated, but in accordance with the circumstances in India at the date when the guidance is sought. A rule may well be binding as part of the Common Law in England because it was developed many years ago and has been approved by the House of Lords so may times that it is now impregnable, without its necessarily following that today it is a rule to be imported into another jurisdiction. What one has to be considered is whether in the circumstances present in this country and at this rule is really in accordance with justice, equity and good conscience."[27] As Oliver Windel Homes put it, the law is always approaching and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent when it ceases to grow. On the other hand, in the application of rules of equity it is not open to an Indian Court to invent a new rule contrary to the well-established rules of equity as founded in England. If the law in England is clear and there is no statutory enactment to the contrary

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[27] *Secretary of State v. Rukminibai,* AIR 1937 Ng. 354.

in India one should hesitate to introduce any supposed rule of equity in conflict with what is to be found in English Law.[28]

6.9 CONCLUSION:

From the aforesaid discussion, it is clear that the law of damages was in an extremely uncertain, ambiguous and confused state for number of decades. It was a mixed bag. It consisted of partly Hindu Law, partly Mohammedan and partly English Law. Which principle of which law would be applied by the Court to decide a dispute was most difficult to predict beforehand till the judicial pronouncement was made. In the *Mofussil*, under the maxim of justice, equity and good conscience, some principles of English law were being imported. In the presidency towns, the Supreme Courts were required to administer Hindu Law, Mohammedan Law and English Laws of damages. In actual practice, the Hindu and Mohammedan laws were not very much applied end, by an large the English Law was in vogue in the presidency towns. This becomes clear from the following statement in 1845 of Sir Lawrence Peel, Chief Justice Calcutta Supreme Court: "The English law as to contracts is so much in harmony with the Mohammedan and Hindu laws as to contracts that a very rarely happens in our courts that any question arises on the law peculiar to those people in actions on contracts." There were many points of difference between the law of Contracts more particularly law of damages prevailing in the *Mofussil* court and in the presidency towns, although the privy counsel made number

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[28] *Ajudhia Prasad v. Chaman Lal,* AIR 1937 All. 601 at p. 606.

of attempts to narrow down this gap. [29] The law also becomes uncertain because of the frequent changes of different views taken by different courts of law. The law in presidency towns was archaic because only the pre-1726 English law prevailed there and no post 1726 statue was made applicable. The law lay deeply buried in precedence and case law and, thus, it becomes difficult even for a well-informed and well-prepared lawyer to ascertain the law. So we can say that the law of contract and law of damages were thus very inarticulate and adversely affected proper development of trade and commerce in the country. However the subsequent stable and uniform development in a form of codification of law by applying Anglo Indian jurisprudence in this area was a great desideratum.

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29 Professor M.P.Jain, (2006), 6th Edition, *Outlines of Indian Legal and Constitutional History,* p.473, Wadhwa & Company, Nagpur.

CHAPTER - VII

DEFINITION AND NATURE OF THE TERM "DAMAGES"

7.1 INTRODUCTION:

This chapter deals with the term damages, its definition and the object for awarding damages for the breach of contract. The rule of law governing damages is also dealt with, statutory law applicable in India and England. The chapter deals with the judicial pronouncements in pre-independence India and post-independence India and a comparative study between the decisions of courts of England and decisions of Indian Courts. The damages are specified into different kinds and dealt with in extensor. The chapter throws light on the researcher's ideas on the comparative study of term damages and the rule to grant damages and the chapter is prelude to chapter on discussion on remoteness of contract as propounded by the English Court in *Hadley v. Baxendal*.[1]

7.2 DAMAGES DEFINED:

The Britishers came to India for trading and in process of trading, became the rulers of India. Being rulers of India, they gave legislations, precedents and authority of the Crown. The term "damages" has no where been defined in the Indian Contract Act, 1872. The natural right of a person or primary right is to be satisfied for the injury, which a person may sustain due to lack of sanctity by individual wrong. These are known as natural rights which human being has. Later on, this natural right gave way to revenge in most ungovernable way or violant way and later on, were

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1 *Hadley v. Baxendale*, (1854) 9 Ex. 341.

substituted by the new laws which was to regulate wrong for which consonant remedies would be the answer. Damages are one kind of remedy for the wrong, which has been committed for the breach of a corresponding obligation. As seen in the earlier chapter, we would delve into the law of contract. The term damages represents pecuniary reward or compensation recoverable by due process of law from the person who has committed any act which is either wrongful or which he ought not to have been committed. A person who has sustained injury would be entitled to pecuniary recompense. The English Court way back in 1955 in[2] *Stonedal No. 1 (Owners) v. Manchester Ship Canal Co.,* defined the term to mean that the disadvantage which is suffered by a person as a result of an act or default of other and its kind of injury which gives rise for legal right for compensation. As far as contract is concerned, the term damages would mean breach of concluded contract and the realization of a shortfall would be monetary compensation.[3] The provisions of Section 73 of the Indian Contract Act has been time and again interpreted from the aforesaid sections, it can be seen that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract, that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the Court arrives at the

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2 *Stonedal No. 1 (Owners) v. Manchester Ship Canal Co;* (1955) 2 All.E.R. 682 (H.L.)

3 *A. Mohd. Basheer v. State of Kerala;* (2003) 6 SCC 159.

conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the terms and words stipulated therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.[4]

The term "Damages", has been defined by various dictionaries, to the effect that injury, harm and compensation for injury.[5] The Hon'ble High Court of Gujarat in[6] *A.S. Sharma v. Union of India*; has defined the term damages to mean a sum of money given as compensation for loss or harm of any kind. Thus damages means a pecuniary compensation of indemnity recovered in the Court by any person who has suffered a loss due to breach of contract. This compensation would mean damages. The term compensation vis-à-vis damages signify the sum of money claimed or adjudged to be paid. The term compensation would etymologically suggest and means balancing of wrongs by payment of money. Compensation is normally adjudged in terms of pecuniary loss or non-pecuniary loss.

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4 *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*; (2003) 5 SCC 705.

5 Collin's Indian Dictionary.

6 *A.S. Sharma v. Union of India*; 1995 ACJ 493 at 498 (Gujarat).

The term "Damages" is defined in[7] the Oxford Dictionary so as to the courts in India has defined the terms damages to signify which, constitute the sum of money claimed or adjudged to be paid in compensation for loss of injury sustained, the value estimated in money, or something loss or withheld.[8]

7.3 OBJECT OF AWARDING DAMAGES:

It would be clear from the loss are in vogue in India that the main purpose or the object for awarding damages is due to breach of contract and the determination of breach of contract has to be determined by a proper method. The object of awarding compensation is when the quantum of loss on breach of the contract is proved. The main purpose and object is to make good loss which a party suffers due to non-fulfillment of the contract which obligatory for the other party to fulfill. The main purpose for awarding damages for breach of contract is limited to what may reasonably be presumed to have been in contemplation of the parties and that the party must have reasonable expectation but he suffered due to non-getting the fruits of its legitimate expectation and when it is proved that there was a wrong, such wrong should not be un-redressed and a person committing breach has to be held liable and for that he has to make good a wrong which he has wrong committed.

Bombay High Court way back in the 1927 in the case of *Seth Ajodhya Prasad v. Sivaprasad*[9] very categorically, through His Lordship Justice Hallifax A.J. C., held that if the creditor omits or is unable to prove that he has sustained

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7 The Oxford Dictionary.
8 *Saraswati Parabhal v. Grid Corp., Orissa,* AIR 2000 Ori 13.
9 *Seth Ajodhya Prasad v. Sivaprasad;* AIR 1927 Nag. 18.

any actual loss or damage, he cannot be granted any relief. The Hon'ble High Court while interpreting the provision of Section 73 and 74 of the Contract Act has held that the object of granting damages is always there is clear proof not only of the creditor having suffered actual damage, but also of the extent of that damage in terms of money. But the purpose of awarding damages is the loss, which the person has incurred due to the breach of the contract. The Bombay High Court in *Nadiar Chand v. Satish Chandra*[10] has held that the object of awarding damages is whether the person himself is not at a wrong and is ready and willing to perform his part, in this case, the plaintiff had entered into a contract for purchase of goods, he gave advance but later on refuses to purchase the goods, and therefore, it was held that he was neither entitled to receive back the earnest money nor was he entitled to any damages. The object of awarding damages can be said to be mitigating the wrong committed to a person, and therefore, over and above, the actual loss, the wronged would be entitled to recover interest even if the same is not expressly proved. The object of the term damages, therefore, can be summarized to mean putting a person in the same position as he was before the breach of contract occurred.

7.4 RULE OF LAW GOVERNING DAMAGES:

- **<u>Law of Damages in India:</u>**

Having discussed the genesis of damages, it would now be important to advert to the conditions which would permit a person to claim damages or claim compensation which would take within it sweep liability for damages, measure of

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[10] *Nadiar Chand v. Satish Chandra;* AIR 1927 Cal. 964.

damages, proof of damages and remote and indirect loss so as to claim specific damages. However, before damages can be measured, it would be important to understand the legal rights, which are conferred on a person. The purview of Section - 73 and 74 of the Indian Contract Act would have to be analysed. What would amount to breach of contract, which would permit a person to claim damages may be liquidated or unliquidated. Construction of contract would be very important for our purpose.

It is an admitted position of law as legislated by provisions of Section 3 to 8 of the Indian Contract Act that a contract is concluded when the sequence of offer and acceptance is complete. It is for the courts to spell out with a meticulous sifting of the correspondence, which took place between the parties at the time, the alleged contract said to have been undertaken or concluded or not concluded. The suit for damages would lie only when the contract is concluded out of freewill of the parties. The parties may enter into contract or conclude the same by their own terms and conditions. Mutual agreement would either absolve the parties or compel the party to do certain things and if the said term is not performed, the other party would be liable for loss, damages, compensation, delay which may directly or indirectly, arise even for the act of God.[11] The provisions of Sections 23 and 24 of the Indian Contract Act would also be required to be considered as they are necessary for validity of the agreement unless there is an exception clause. The consideration or object of the agreement should always be lawful then only other party would be entitled to damages if the agreement itself is unlawfaul, the said unlawful consideration would make the entire agreement void as per

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11 *M/s. Basanti Bastralaya vs. River Steam Navigation C. Ltd*.; AIR 1987 Cal 271.

the provisions of section 64 of the Act. If the unlawful consideration is severable, the lawful portion of such consideration can be acted upon either by specific performance or by claiming damages can be sought from the defaulting party.

As the study is based on the analysis of the decisions of the English Court and the Indian Courts, it would be important for us to analyse Judicial pronouncements, as early as 1927, it was held by the Madras High Court in *Nanchappa Koundan v. Vetessery Tarwad Karnavan*; [12] that the courts in India have the powers both of a Court of equity and a Court of law and they can award even interest though not provided for under the Interest Act. The Court has held that the rule of damages as far as India is concerned is based both, on equitable principles and the law of contract. But a person would be entitled to interest, from the date of the advance, on the damages which he has claimed as damages, can be awarded only from the date of a contract comes into force. Thus where the parties make advance, he cannot claim damages from that date the reason being that the contract was not performed. However, in the opinion of the Researcher, the person would be entitled to damages for the damages from the party before filing of the suit and not between the date of the advance and the date of performance. The Researcher is fortified in this view by the decision of the Madras High Court in the case of *Ramalinga Mudaliar v. S.R. Muthuswami Ayyar & Sons.* [13] The Apex Court has also in *Maula Bux v. Union of India*[14] has held that the plaintiff is not entitled to interest prior to the date of the

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12 *Nanchappa Koundan v. Vetessery Tarwad Karnavan;* AIR 1927 Mad. 47.

13 *Ramalinga Mudaliar v. S.R. Muthuswami Ayyar & Sons;* AIR 1927 Mad. 99.

14 *Maula Bux v. Union of India;* AIR 1970 SC 1955.

suit. However, the said view was confirmed as no argument was advanced by the plaintiff-appellant. Thus the rule is that interest if not recoverable under Contract Act or under Interest Act, then also interest on claim can be granted.

It is a settled legal position as far as India is concerned that where the dispute arises between the buyer and seller, buyer would be entitled to claim damages if he proves goods supplied to him were of inferior quality than the one for which the parties had negotiated.

Would a person be liable for damages if there is misrepresentation under the Contract Act? The effect of misrepresentation would entitle a person to damages but if the person is unable to prove that there was misrepresentation, he would not be entitled to any damages and the suit based on misrepresentation if not proved to one of fraud but at the most of the omission to state the material fact would give other remedy to the plaintiff other then damages:

The Hon'ble High Court of Bombay in Sorab Shah's case held that the only remedy open to the plaintiff was under Section 19 of the Indian Contract Act, 1872, on the ground of misrepresentation; that assuming without deciding that there is a misrepresentation, the plaintiffs had two remedies open to them: (a) avoidance or rescission, and (b) completion and the enforcement of misrepresentation; that it was not open to the plaintiff to avoid contract, for which suit was brought after the expiry of the term of contract; that even if the plaintiffs were entitled to be put in the same position in which they would have been, if the representation made had been true, the plaintiffs failed to

prove that their exceeded Rs. 3,000/- or which the government had already allowed.[15]

The provisions of section 73 and 74 can't be read or interpreted in isolation. The concept of damages depends on several circumstances. These circumstances are not alien or new interpretative aspects but those, which will have to be culled out from the agreement. The term agreement is in contraindication to the term contract. The reason being all contract are agreements but if it is not vise-versa. For an agreement to be an enforceable contract has to fulfill the definition of the term contract as defined in Section 2(e) of the Indian Contract Act.

The provisions of Section 73 and 74 speak about the compensation for loss or damage caused by breach of contract, and therefore, dissecting this section, it would be relevant to our study to advert back to what is a contract and when it can be said to have been broken and to further analyse what would constitute breach of such contract. After having understood this concept, it would be relevant what would be the compensation to be paid to such party who has been wronged. The law of damages is further qualified by the term arose in the usual course of thinking from such breach. One more aspect is provided in the Section it self that the parties must know that what would be the damage if such breach occurred and this knowledge is attributed at the time when the contract itself is made. However, the proviso makes it clear that no compensation should be given for remote and indirect loss or damage. Even compensation can be granted for failure of discharging obligations, which would resemble one, which is created by

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15 *Sorab Shah vs. Secretary of State*; 1927 BLR 1535.

such contract. Therefore, quasi contract are also taken care of. The provisions of Section 73 and 74 and illustrations given in Section 73 and 74 are reproduced below for the ready reference:

- **Section 73. Compensation for loss or damage caused by breach of contract:**

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

- **Compensation for failure to discharge obligation resembling those created by contract:**

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.- In estimating the loss or damage arising from a breach of contract, the means which existed or remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpeter of like quality at the time when the saltpeter ought to have been delivered.

(b) *A* hires *B*'s ship to go to Bombay, and there takes on board, on the first of January, a cargo, which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

(c) *A* contracts to buy of *B*, as a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A,* by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rise at he time when *A* informs *B* that he will not accept it.

(d) *A* contracts to by *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract prince over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A,* the owner of a boat, contract with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some unavoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) *A* contracts to repair *B*'s house in a certain manner, and receives payment in advance. *A* repairs the house, but nor according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A,* by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

(i) *A* delivers to *B,* a common carrier, a machine, to be conveyed, without delay, to *A's mill, informing B* that this mills is stopped for want of machine. *B* unreasonably delays the delivery of the machine, and *A,* inconsequence, loses a profitable contract with the Government. *A* is entitled to receive from *B,* by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) *A,* having contracted with *B* to supply *B* with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1,000 tons of iron at 80 rupees a ton, telling *C* that he does so far the purpose of performing his contract with *B. C* fails to perform his contract with *A, who cannot procure other iron, and B,* in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made bythe performance of his contract with *B.*

(k) *A* contracts with *B* to make and deliver to *B,* by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery, at the time specified, and, in consequences of this; *B* is obliged to procure another at a higher price than that which he was to have paid to *A,* and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A),* and is compelled to make compensation for breach of that contract. *A* must pay to *B,* by way of compensation, the difference between the contract price of the price of machinery and the sum paid by *B* for another but

not the sum paid by *B* to the third person by way of compensation.

(l) *A,* a builder, contracts to erect and finish a house by the first of January, in order that *B* may give possession of it at that time to *C,* to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C. A* builds the house so badly that, before the first of January, it falls down and has to be rebuilt by *B,* who in consequence, loses the rent, which he was to have, received from. *C,* and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C.*

(m) *A* sells certain merchandise to *B,* warranting it to be of a particular quality, and *B,* in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

(n) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day. *B,* in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest upon the day of payment.

(o) *A* contracts to deliver 50 maunds of saltpeter to *B* on the first of January, at a certain price, *B,* afterwards, before the first of January, contracts to sell saltpeter to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B,* the market price of

the first of January, and not the profit, which would have arisen to *B* from the sale to *C,* is to be taken into account.

(p) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks the promise, and *B,* having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by closing of the mill.

(q) *A* contracts to sell and deliver to *B,* on the first of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time and too late to be used that year in making the caps. *B* is entitled to receive from *A,* by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) *A,* a ship owner, contracts with *B* to convey him from Calcutta to Sydney in *A's* ship, sailing on the first of January, and *B pays to A,* by way of deposit, one-half of his passage money. The ship does not sail on the first of January, and *B,* after being, in consequence, detained in Calcutta for some time, and thereby put ot some expenses, proceeds to Sydney in another vessel, and in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B* his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship

over the agreed upon the first, but not the sum of money which *B* lost by arriving in Sydney too late.

➢ **Damages as a remedy for breach of contract:**

The first paragraph of Section 73 deals with compensation for loss or damage caused by breach of contract. It states that where a contract is broken, the party suffering from the breach of contract is entitled to receive compensation from the party who has broken the contract. Compensation can be recovered for loss or damage:

(I) that arose in the usual course of things from such breach; or

(II) which the party knew at the time they made the contract as likely to result from such breach.

The second paragraph provides that no compensation is payable for any remote or indirect loss or damage. The third paragraph applies the same principle when breach occurs of obligation resembling contract. The forth paragraph provides that while assessing damage, the means which existed to the person claiming damages of remedying the inconvenience caused by non-performance, must be considered.

Damages for breach of contract committed by the defendant are compensation to the plaintiff for the damage, loss or injury he has suffered through that breach. An action for damages is always available as a matter of right when a contract has been broken, as against the relief of specific performance, which lies in the discretion of the Court.[16]

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[16] Specific Relief Act, 1963, Ss. 10-24, particularly, Ss. 10 and 20.

Even when the plaintiff is able to prove his loss, damages may not necessarily be a full recompense for his loss; `it must be remembered that the rules as to damages can in the nature of things only be approximately just'.[17]

In terms of an arbitration agreement, the arbitrator gave an award by excluding provisions of Section 73 of the Indian Contract Act, 1872. It was held that in the context of terms and conditions of the contract, provisions of Section 73 could be excluded, and thus the award could not be regarded as patently absurd or wholly unreasonable.[18]

A statutory receiver committed default in respect of supply of the contracted quality of sugar. The suit was filed against him and also against the appellant corporation in which the property had vested under law. It was held that the receiver was not personally liable and the recovery could be made only from the property of the mill and through the corporation. The liability of the receiver was not personal but it attached to the property in his Receivership.[19]

- **Section 74. Compensation for breach of contract where penalty stipulated for:**

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have

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17 *Rodocanachi v. Milburn,* (1886) 18 QBD 67, p. 78.

18 *Maharashtra State Electricity v. Sterilite Industries (India),* (2001) 8 SCC 482.

19 *Uttar Pradesh State Sugar Corporation v. Mahalchand M. Kothari,* (2005) 1 SCC 348.

been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.-A stipulation for increased interest from the date of default may be a stipulation by way of penalty.[20]

Exception.-When any person enters into any bail-bond, recognizance or other Instrument of the same nature, or under the provisions of any law, or under the orders of the [Central Government][21] or of any [State][22] Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.-A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

(a) *A* contracts with *B* to pay *B* Rs 1,000 if he fails to pay *B* Rs 500 on a given day. *A* fails to pay *B* Rs 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs 1,000, as the Court

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20 Substituted for first paragraph of s.74 by s.4, the Indian Contract (Amendment) Act 1899 (6 of 1899). The first paragraph of the section stood as follows before the amendment: 'When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the parry complaining of the breach is entitled, whether or nor actual damages or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation nor exceeding the amount so named.'

21 These words were substituted for 'Government of India' by the AO 1937.

22 These words were substituted for 'Provincial' by the ALO 1950.

considers reasonable.

(b) *A* contracts with *B* that, if *A* practices as a surgeon within Calcutta, he will pay *B* Rs 5,000. *A* practises as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) *A* gives a recognizance binding him in a penalty of Rs 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) *A* gives *B* a bond for the repayment of Rs. 1,000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from *A* such compensation as the Court considers reasonable.

(e) *A*, who owes money to *B*, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and *B* is only entitled to reasonable consideration in case of breach.

(f) *A* undertakes to repay *B* a loan of Rs 1,000 by five equal monthly installments with a stipulation that, in default of payment of any installment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) *A* borrows Rs 100 from *B* and gives him a bond for Rs 200, payable by five yearly installments of Rs 40, with a stipulation that in default of payment of any

installment, the whole shall become due. This is a stipulation by way of penalty.[23]

Before adverting to the principle on which the damages can be granted, it would be important to go through the provisions of Section 4 and 5, which deal with the formation of bilateral contract.

The offer may be withdrawn by a person who had made an offer but it has to be withdrawn before the acceptance or even if it is accepted before it was communicated to him. It is cardinal principle that the acceptance should be unconditional and absolute if there is no binding, the contract between the parties or if the acceptance is neither absolute nor unconditional, a party would not be entitled to damages. The next aspect, which has to be looked into for granting of damages, is that the consideration should not be unlawful. The law not only requires consideration but insist on lawful consideration. The object also must be lawful. Section - 23 makes it clear that a crime, which has unlawful consideration, is void (illegal). This is also seen that at times, damages have to be asserted if on the basis of terms of contract and if on time, term is essential ingredient.

7.5 DAMAGES DISTINGUISHED FROM COMPENSATION AND OTHER KINDS OF PAYMENT:

The term damages, compensation, interest, loss, actionable wrong are inter-connected but there is thin line of difference. The distinction between the terms “damages”

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[23] Illustrations (d) to (g) added by s.4(2), the Indian Contract (Amendment) Act 1899 (6 of 1899).

and “compensation” should never be ignored. At times, they are intermingled and being etymologically equivalence. The term “damages” is used in reference to pecuniary recompense awarded for loss or injury caused by wrongful act or omission, whereas compensation can be given even for lawful act which causes injury and for which indemnity has to be obtained under the provisions of specific statute, for example, Motor Vehicle Act, Land Acquisition. The two terms are not equivalent of each other. However, the English Courts have considered that the term compensation would include the term damages in its broad genus.[24] The term compensation takes within its purview any loss, which a party has suffered, may be out of contract or within a contract. The term compensation would take within its purview the loss, which a party would suffer, if it is prevented from doing some work and it would come under the wider definition of the word `damages’. Damages cannot be classified into any rigid formula. A person who suffers should receive proper monitory recompense.

There are certain special terms which are frequently used in connection with the subject of damages and which, though they acquired special meaning in legal phraseology, are not at all distinct and separate from one another. It is, therefore, necessary to acquaint ourselves with those terms first and that legal significance before we proceed further.

The word “compensation” would embrace in its purview any actual loss suffered by a party. For example, if trees had to be cut or certain structure had to be altered or some unwarranted structure had to be demolished, in that case a question of praying compensation would arise but the

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[24] *Doyle v. Olby Ltd*.; (1969) 2 All. E.R. 119.

question as to what loss a party would suffer in case he was prevented from making any constructions or using the roof would not come within the meaning of the word "compensation". Such type of loss would be governed under the wider definition of the word "damages".[25]

One can easily distinguished word "damages" from debt. And from a sum payable under contractual liability to pay a sum certain on a given event (other than breach), but include sums payable under claims for a reasonable price or remuneration for goods sold or services rendered and under claims under an insurance policy than the quantum of damage has to be proved. Damages are not only distinguishable from compensation only but from a penalty and even from costs.[26]

7.6 DAMAGES SHOULD NOT BE STANDARDISED:

It cannot be said that damages should be standardized or that there should be any attempt at any classification. It is but to recognize that, since in a Court of Law, compensation for physical injury can only be assessed and fixed in monetary terms, the best the Court can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considerate opinion. As far as possible, it desirable that to litigants whose claims correspond should receive similar treatment, just as it is desirable that they

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25 *Union of India v. Ram Chandra,* AIR 1975 All. 221 at p. 225.

26 Halsbury's *Laws of England*, 4th Edn. Vol. 12 p. 413; *Amarjit kaur v. Venguard Insurance Company Ltd*., AIR 1982 Delhi 1 at p. 3.

should both receive fare and equal treatment and by that fare and equal justice.[27]

7.7 CONCLUSION:

The aforesaid discussion would show that from the time when the Britishers came to India for trading and in the process of trading became the rulers of India. Being rulers of India, they gave legislations, precedent and authority of the crown. Law of damages was completely developed under the shadow of the British regime. However, the word "Damage" has nowhere been defined in either English Law or in the Indian Contract Act, 1872. But with the gradual development of stable and systematic legal system we are now able to arrive at clear meaning of damages and various heads in which it can be claimed. There has been a long journey through which the concept of damages has passed. The decision taken by Exchaquer Court in England while dealing in the case of *Hadley v. Baxendal*[28] proved to be a limestone in the history of development of the concept of damages for breach of contract. Indian Law on damages still holds the view of *Hadley v. Baxendal* decided before one and half centuries. The chapter would show that the term "Damages" in India and in England connotes in injury for compensation. The Indian law is based on Section 73 and 74 of the Indian Contract Act and the chapter shows that what amount has to be paid as damages would vary from Court to Court, contract to contract and kind of loss suffered by the plaintiff. It will be seen that the Indian Law

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27 *Singh (an infant) v. Toong Fong Omnibus Co. Ltd.,* (1964) 3 All. E.R. 925 at p. 927.

28 *Hadley v. Baxendale*, (1854) 9 Ex. 341.

is March-ahead of his counter part in England. The chapter in the beginning deals with the definition of damages, object of awarding damages and rule of law governing the damages. The said chapter further deals with various types of damages and differences between compensation and damages under the Indian Contract Act, 1872.

CHAPTER - VIII

CONCEPT OF REMOTENESS OF DAMAGES

8.1 INTRODUCTION:

Development of General Rule for providing compensation for breach of contract:

The scope of measure of damages in action on Contract is basically very limited. The Jury or the decision making authority or those standing in the place of jury have to decide the measure of damages for breach of Contract within its four corner. While deciding the damages, the decision making authority have not to traverse any vague fields. Basically the damages are never "at large in action on Contract". The injury sustained by the promisee can in almost every case, be very nearly measured by a pecuniary standard, and satisfaction rendered with a near approach to completeness. One can say that damages in actions on Contract are only compensation, not the profit making issue. But the difficulty is even this is frequently inadequate because the Law has set its own limits upon the theory of compensation. It takes into consideration only the proximate and direct consequences of the wrongful act which are necessarily arising out of breach of contract. In other words while deciding the amount of compensation, the decision making authority is not required to have a look or to give a thought about the indirect consequences of breach of contract. One can say the primary and immediate result of such breach of contract alone will be taken into consideration.[1] There is no doubt it that it has been

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1 *Hadley v. Baxendale*, (1854) 9 Ex. 341.

repeatedly held by the Courts that the party who has sustained loss by the reason of breach of contract with respect to damages is required to be placed in the same situation as he would have been in, if the contract had been performed.[2] But as we all know that this principle is only theoretically proved, academically applicable, but in practice it is certain crystal clear that it is impossible to restore the party, who has suffered with breach of contract by the other side, to status quo ante.

8.2 SCOPE OF PROTECTION; MEASURE OF DAMAGES BEFORE THE RULE IN *HADLEY V. BAXENDALE*[3]

The basis rule for deciding or solving the problem of measure of damages for breach of contract is that the plaintiff is entitled to placed, so far as money can do it, in the same position as he would have been in had the contract been performed. This Rule is limited first, but not substantially. The principle as to causation just dealt with; the second and much more far reaching limit is that the scope of protection is marked out by was in the contemplation of parties. When damage is said to be too remote in contract it is generally this later factor, i.e. is in issue, i.e. in the same position as he would have been in had the contract been performed.

In 1848 Parke B. in his remarkable decision in *Robinson v. Harman*[4] clearly stated that the starting Rule for the assessment of an award of contract damages, no general

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2 *Robinson v. Harman,* (1848) 1 Ex. 853; compare *Livingstone v. Rawyards Coal.*, (1880) 5 A.C. 75; *Union of India v. Baij Nath Mandal,* AIR 1951 Pat. 219.

3 *Hadley v. Baxendale*, (1854) 9 Ex. 341.

4 *Robinson v. Harman,* (1848) 1 Ex. 850 at 855.

rules as to whether damage might be too remote had been formulated. Thus, the cases of that time seem to be very generous to the plaintiffs especially in *Black v. Baxendale*[5] and *Waters v. Towers.*[6]

The generous attitude of rule of damages can be understood by the following wording which is re-produce from the aforesaid decided case laws:

"this purpose, if relentlessly pursued, would provide him [the plaintiff] with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable".

Looking to the generousness to plaintiff, there was a strong need rather a compelling necessity of some limitations to the rule of damages. In the field of damages it becomes dyeing need for the defendant and / or all the concerned or affected parties that some limitation should be introduced.

8.3 REMOTENESS OF DAMAGE:

In case of breach of contract the injured party may feel the consequences for a long time and in variety of ways. Every breach of contract upsets many settled expectations of the injured party. Theoretically the consequences of a breach may be endless but there must be an end to liability. The defendant cannot be held liable for all that follows from his breach. There must be a limit to liability and beyond that limit the damage is said to be too remote, and therefore,

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5 *Black v. Baxendale,* (1847) 1 Ex. 410.
6 *Waters v. Towers,* (1853) 8 Ex. 401 : 22 L.J. 186 : 155 E.R. 1404.

irrecoverable.[7] With the aforesaid discussion, one thing is very clear that somewhere in between 1840 to 1850 the Jury, the Courts and the other decision making authority was in need to frame some straight jacket formula to make a balance between the parties to the litigation. The idea must have been there in the mind of the Jury, the Courts and the other decision making authority to draw the line, which decides the proper, valid, lawful, appropriate and proportionate damages for breach of contract. But the crucial problem must have been where to draw the line as the difference was very thin line difference between the damages naturally arising from a breach of contract and the damages which would not arise in a usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case.

However, at the present surprise of the legal fraternity this difficult task was successfully achieved in a short time in landmark decision of *Hadley v. Baxendale*. Today, as with all cases decided before *Hadley v. Baxendale* on question of remoteness in contract, they cannot be regarded as very compelling authority.

Hadley and another v. Baxendale and others[8]

This landmark decision given by Court of law of England proved to be landmark decision by all means for number of decades. This is the case law which has provided the base to the framers of laws while codifying and modifying the law of contract as far as the law of contract, law of breach of

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7 *Palsgraf v. Long Island R.R. Co.,* Court of Appeals of NY, (1928) 284 NY 339.

8 *Hadley v. Baxendale,* (1854) 9 Ex. 341, S.C.2 C . L.R. 517; 23 L.J. Ex.179; 18 Jur.358; 2 W.R. 302; 23 L.T. O.S. 69.

contract, law of damages and circumstances in which the damages can be awarded to the aggrieved party and the quantum of damages are concerned.

Up to what extent damages can be recovered from the other side who is responsible for breach of contract by the aggrieved party is laid down in this famous case popularly known as *Hadley v. Baxendale* by the Court of law in England. The facts in nutshell of the case read as under:

“Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of the breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Where the plaintiffs, the owners of a flour mill, sent a broken iron shaft to an office of the defendants, who were common carriers, to be conveyed by them, and the defendants’ clerk, who attended at the office, was told that the mill was stopped, that the shaft must be delivered immediately, and that a special entry, if necessary, must be made to hasten its delivery; and the delivery of the broken shaft to the consignee, to whom it had been sent by the plaintiffs as a pattern, by which to make a new shaft, was delayed for an unreasonable time; in consequence of which, the plaintiffs did not receive the new shaft for some days after the time they ought to have received it, and they were consequently unable to work their mill from want of the new shaft, and thereby incurred a loss of profits : Held, that,

under the circumstances, that loss could not be recovered in an action against the defendants as common carriers."

However, for the academic purpose and to get a better idea about the law of damages, the important paragraphs of the judgment would be required to be reproduced, which read as under:

"The first count of the declaration stated, that, before and at the time of making by the defendants of the promises hereinafter mentioned, the plaintiffs carried on the business of millers and mealmen in co-partnership, and were proprietors and occupiers of the City Steam Mills, in the city of Gloucester, and were possessed of a steam-engine, by means of which they worked the said mills, and therein cleaned corn, and ground the same into mean, and dressed the same into flour, sharps, and bran, and a certain portion of the said steam-engine, to wit, the crank shaft of the said steam-engine, was broken and out of repair, whereby the said steam-engine was prevented from working, and the plaintiffs were desirous of having a new crank shaft made for the said mill, and had ordered the same of certain persons trading under the name of W.Joyce & Co., at Greenwich, in the county of Kent, who had contracted to make the said shaft for the plaintiffs; but before they could complete the said new shaft it was necessary that the said broken shaft should be forwarded to their works at Greenwich, in order that the said new shaft might be made so as to fit the other parts of the said engine which were not injured, and so that it might be substituted for the said broken shaft; and the plaintiffs were desirous of sending the said broken shaft to the said W. Joyce & Co. for the purpose aforesaid; and the defendants, before and at the time of the making of the said promises, were common

carriers of goods and chattels for hire from Gloucester to Greenwich, and carried on such business of common carriers, under the name of “Pickford & Co.;” and the plaintiffs, at the request of the defendants, delivered to them as such carriers the said broken shaft, to be conveyed by the defendants as such carriers from Gloucester to the said W. Joyce & Co., at Greenwich, and there to be delivered for the plaintiffs on the second day after the day of such delivery, for reward to the defendants; and in consideration thereof the defendants then promised the plaintiffs to convey the said broken shaft from Gloucester to Greenwich, and there on the said second day to deliver the same to the said W. Joyce & Co. for the plaintiffs. And although such second day elapsed before the commencement of this suit, yet the defendants did not nor would deliver the said broken shaft at Greenwich on the said second day, or to the said W. Joyce & Co. on the said second day, but wholly neglected and refused so to do for the space of seven days after the said shaft was so delivered to them as aforesaid.

The second count stated, that, the defendants being such carriers as aforesaid, the plaintiffs, at the request of the defendants, caused to be delivered to them as such carriers the said broken shaft, to be conveyed by the defendants from Gloucester aforesaid to the said W. Joyce & Co., at Greenwich, and there to be delivered by the defendants for the plaintiffs, within a reasonable time in that behalf, for reward to the defendants; and in consideration of the premises in this count mentioned, the defendants promised the plaintiffs to use due and proper care and diligence in and about the carrying and conveying the said broken shaft from Gloucester aforesaid to the said W. Joyce & Co., at Greenwich, and there delivering the same for the plaintiffs

in a reasonable time then following for the carriage, conveyance, and delivery of the said broken shaft as aforesaid; and although such reasonable time elapsed long before the commencement of this suit, yet the defendants did not nor would use due or proper care or diligence in or about the carrying or conveying or delivering the said broken shaft as aforesaid, within such reasonable time as aforesaid, but wholly neglected and refused so to do; and by reason of the carelessness, negligence, and improper conduct of the defendants, the said broken shaft was not delivered for the plaintiffs to the said W. Joyce & Co., or at Greenwich, until the expiration of a long and unreasonable time after the defendants received the same as aforesaid, and after the time when the same should have been delivered for the plaintiffs; and by reason of the several premises, the completing of the said new shaft was delayed for five days, and the plaintiffs were prevented from working their said steam-mills, and from cleaning corn, and grinding the same into meal, and dressing the meal into flour, sharps, or bran, and from carrying on their said business as millers and mealmen for the space of five days beyond the time that they otherwise would have been prevented from so doing, and they thereby were unable to supply many of their customers with flour, sharps, and bran during that period, and were obliged to buy flour to supply some of their other customers, and lost the means and opportunity of selling flour, sharps, and bran, and were delivered of grains and profits which otherwise would have accrued to them, and were unable to employ their workmen, to whom they were compelled to pay wages during that period, and were otherwise injured, and the plaintiffs claim £300.

The defendants pleaded non-assumpserunt to the first count; and to the second payment of £25 into Court in satisfaction of the plaintiffs' claim under that count. The plaintiffs entered a nolle prosequi as to the first count; and as to the second plea, they replied that the sum paid into Court was not enough to satisfy the plaintiffs' claim in respect thereof; upon which replication issue was joined.

At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on the an extensive business as millers at Gloucester and that, on the 11th May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam engine was manufactured by M/s. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiff's servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the defendants, took the shaft before noon, for the purpose of being conveyed to Greenwich, and the sum of 2l.4s. was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have

done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received. On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict with 25 l. damages beyond the amount paid into Court.

Whateley, in last Michaelmans Term, obtained a rule nisi for a new trial, on the ground of misdirection.

Keating and Dowdeswell (Feb.1) showed cause:

The plaintiffs are entitled to the amount awarded by the jury as damages. These damages are not too remote, for they are not only the natural and necessary consequence of the defendants' default, but they are the only loss, which the plaintiffs have actually sustained. The principle upon which damages are assessed is founded upon that of rendering compensation to the injured party. This important subject is ably treated in Sedgwick on the Measure of Damages. And this particular branch of it is discussed in the third chapters, where, after pointing out the distinction between the civil and the French law, he says, "It is sometimes said, in regard to contracts, that the defendant shall be held liable for those damages only which both parties may fairly be supposed to have at the time contemplated as likely to result from the nature of the agreement, and this appears to be the rule adopted by the writers upon the civil law." In a subsequent passage he says, "In cases of fraud the civil law made a broad distinction" and he adds, "in such cases the debtor was liable for all the consequences." It is difficult, however, to see what the ground of such principle is, and how the

ingredient of fraud can affect the question. For instance, if the defendants had maliciously and fraudulently kept the shaft, it is not easy to see why they should have been liable for these damages, if they are not to be held so where the delay is occasioned by their negligence only. In speaking of the rule respecting the breach of a contract to transport goods to a particular place, and in actions brought on agreements for the sale and delivery of chattels, the learned author lays it down, that, “In the former case, the difference in value between the price at the point where the goods are and the place where they were to be delivered, is taken as a measure of damages, which in fact, amounts to an allowance of profits; and in the latter case, a similar result is had by the application of the rule, which gives the vendee the benefit of the rise of the market price.” The several cases, English as well as American, are their collected and reviewed.

(PARKE, B.: The sensible rule appears to be that which has been laid down in France, and which is declared in their code: Code Civil, liv. Iii. Tit. Iii. Ss. 1149, 1150, 1151, and which is thus translated in Sedgwick: “The damages due to the creditor consist in general of the loss that he has sustained, and the profit which, he has been prevented from acquiring, subject to the modifications hereinafter contained. The debtor is only liable for the damages foresee, or which might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and

immediately results from the non-performance of the contract.")

If that rule is to be adopted, there was ample evidence in the present case of the defendants knowledge of such a state of things as would necessarily result in the damage the plaintiffs suffered through the defendants default. The authorities are in the plaintiffs' favour upon the general ground. In *Nurse v. Barns*,[9] which was an action for the breach of an agreement for the letting of certain iron mills, the plaintiff was held entitled to a sum of 500 l., awarded by reason of loss of stock laid in, although he had only paid 10 l. by way of consideration. In *Borrandaile v. Brunton,*[10] which was an action for the breach of the warranty of a chain cable that it should last two years as a substitute for a rope cable of sixteen inches, the plaintiff was held entitled to recover for the loss of the anchor, which was occasioned by the breaking of the cable within the specified time.

(ALDERSON, B.: Why should not the defendant have been liable for the loss of the ship?

PARKE, B.: Sedgwick doubts the correctness of that report.[11]

MARTIN B.: Take the case of the non-delivery by a carrier of a delicate piece of machinery, whereby the whole of an extensive mill is thrown out of work for a considerable time; if the carrier is to be liable for the loss in that case, he might incur damages to the extent of 10,000l.

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9 *Nurse v. Barns,* 1 Sir T. Ray. 77.

10 *Borrandaile v. Brunton,* 20 R.R. 548 (8 Taunt. 535).

11 The learned Judge has frequently observed of late that the 8th Taunton is of but doubtful authority, as the cases were not reported by Mr.Taunton himself. [See 19 R.R. Preface, vi., vii.]

PARKE, B., referred to *Everard v. Hopkins*[12])

These extreme cases, and the difficulty which consequently exists in the estimation of the true amount of damages, supports the view for which the plaintiffs contend, that the question is properly for the decision of a jury, and therefore that this matter could not properly have been withdrawn from their consideration. In *Ingram v. Lawson,*[13] the true principle was acted upon. That was an action for a libel upon the plaintiff, who was the owner and master of a ship, which he advertised to take passengers to the East Indies; and the libel imputed that the vessel was not seaworthy, and that Jews had purchased her to take out convicts. The COURT held, that evidence showing that the plaintiff's[14] profits after the publication of the libel were 1,500 l. below the usual average, was admissible, to enable the jury to form an opinion as to the nature of the plaintiff's business, and of his general rate of profit. Here, also, the plaintiffs have not sustained any loss beyond that which was submitted to the jury. *Bodley v. Reynolds*[15] and *Kettle v. Hunt*[16] are similar in principle. In the latter, it was held that the loss of the benefit of trade, which a man suffers by the detention of his tools, is recoverable as special damages.

(PARKE, B: Suppose, in the present case, that the shaft had been lost, what would have been the damage to which the plaintiffs would have been entitled?)

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12 *Everard v. Hopkins,* 2 Bulst 332.
13 *Ingram v. Lawson,* 54 R.R. 766 (6 Bing. N.C. 212).
14 *Hadley v. Baxendale,* (1854) 9 Ex. 341 at p. 348.
15 *Bodley v. Reynolds,* 70 R.R. 640 (8 Q.B. 779).
16 *Kettle v. Hunt,* Bull N.P. 77.

The loss they had sustained during the time they were so deprived of their shaft, or until they could have obtained a new one. In *Black v. Baxendale,*[17] by reason of the defendants' omission to deliver the goods within a reasonable time at Bedford, the plaintiff's agent, who had been sent there to meet the goods, was put to certain additional expenses, and this Court held that such expenses might be given by the jury as damages. In *Brandt v. Bowlby,*[18] which was an action of assumpsit against the defendants, as owners of a certain vessel, for not delivering a cargo of wheat shipped to the plaintiffs, the cargo reached the port of discharge but was not delivered; the price of the cargo at the time it reached the port of destination was held to be the true rule of damages. "As between the parties in this cause," said PARKE, J., "the plaintiffs are entitled to be put in the same situation as they would have been in, if the cargo had been delivered to their order at the time when it was delivered to the wrong party; and the sum it would have fetched at that time is the amount of the loss sustained by the non-performance of the defendants' contract." The recent decision of this Court, in *Waters v. Towers*,[19] seems to be strongly in the plaintiffs' favour. The defendants there had agreed to fit up the plaintiffs' mill within a reasonable time, but had not completed their contract within such time; and it was held that the plaintiffs were entitled to recover, by way of damages, the loss of profit upon a contract they had entered into with third parties, and which they were unable to fulfill by reason of the defendants' breach of contract.

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17 *Black v. Baxendale,* (1847) 1 Ex. 410.
18 *Brandt v. Bowlby,* 36 R.R. 796 (2 B. & Ad. 932).
19 *Waters v. Towers,* 91 R.R. 556 (8 Ex. 401).

(PARKE, B.: The defendants there must of necessity have known that the consequence of their not completing their contract would be to stop the working of the mill. But how could the defendants here know that any such result would follow?)

There was ample evidence that the defendants know the purpose for which this shaft was sent, and that the result of its non-delivery in due time would be the stoppage of the mill; for the defendants' agent, at their place of business, was told that the mill was then stopped, that the shaft must be delivered immediately, and that if a special entry was necessary to hasten its delivery, such an entry should be made. The defendants must, therefore, be held to have contemplated at the time what in fact did follow, as the necessary and natural result of their wrongful act. (They also cited *Ward v. Smith,*[20] and PARKE B., referred to *Levy v. Langridge.*[21])

Whateley, Willies, and Phipson, in support of the rule (Feb.2):

It has been contended, on the part of the plaintiffs, that the damages found by the jury are a matter fit for their consideration; but still the question remains, in what way ought the jury to have been directed? It has been also urged, that, in awarding damages, the law gives compensation is not to be awarded; for instance, the non-payment of a bill of exchange might[22] lead the utter ruin of the holder, and yet such damage could not be considered as necessarily resulting from the breach of contract, so as

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20 *Ward v. Smith,* (1822) 11 Price 19 : 147 E.R. 388.
21 *Levy v. Langridge,* 46 R.R. 689 (4 M. & W. 337).
22 *Hadley v. Baxendale,* (1854) 9 Ex. 341 at p. 350.

to entitle the party aggrieved to recover in respect of it. Take the case of the breach of a contract to supply a Rick-cloth, whereby and in consequence of bad weather the hay, being unprotected, is spoiled, that damage would not be recoverable. Many similar cases might be added. The true principle to be deduced from the authorities upon this subject is that which is embodied in the maxim: "In *jure non remota causa sed proxima spectator*." Sedgwick says,[23] "In regard to the quantum of damages, instead of adhering to the term 'compensation', it would be far more accurate to say, in the language of Domat, which we have cited above, 'that the object is to discriminate between that portion of the loss which must be borne by the offending party and that which must be borne by the sufferer. The law in fact aims not at the satisfaction but at a division of the loss." And the learned author also cites the following passage from Broom's Legal Maxims: "Every defendant,' says Mr.Broom, "against whom an action is brought experiences some injury or inconvenience beyond what the costs will compensate him for."[24] After referring to the case of *Flurean v. Thornhill,*[25] he says, "Both the English and American Courts have generally adhered to this denial of profits as any part of the damages to be compensated, in case of, breach of contract. So, in a case of illegal capture, Mr. Justice Story rejected the item of profits on the voyage, and held this general language: 'Independent, however, of all authority, I am satisfied upon principle, that an allowance of damages upon the basis of a calculation of profits is inadmissible.[26] The rule would be in the highest degree unfavourable to the interests of the community. The subject would be involved in

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23 *Hadley v. Baxendale,* (1854) 9 Ex. 341.

24 Broom's Legal Maxims, p. 95; *Davies v. Jenkins*, 63 R.R. 744 (11 M. & W. 755).

25 *Floreau v. Thornhill,* (1776) 2 Wm. Bl. 1078.

26 *Hadley v. Baxendale,* (1854) 9 Ex. 341 at 351.

utter uncertainty. The calculation would proceed upon contingencies, and would require knowledge of foreign markets to exactness, in point of time and value, which would sometimes present embarrassing obstacles; much would depend upon the length of the voyage, and the season of arrival, much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjectures, and not upon facts; such a rule therefore has been rejected by courts of law in ordinary cases, and instead of deciding upon the gains or losses of parties in particular cases, a uniform interest has been applied as the measure of damages for the detention of property.'" There is much force in that admirably constructed passage. We ought to pay all due homage in this country to the decisions of the American Courts upon this important subject, to which they appear to have given much careful consideration. The damages here are too remote. Several of the cases, which were principally relied upon by the plaintiffs, are distinguishable. In *Waters v. Towers,*[27] there was a special contract to do the work in a particular time, and the damage occasioned by the non-completion of the contract was that to which the plaintiffs were held to be entitled. In *Borradaile v. Brunton*[28] there was a direct engagement that the cable should hold the anchor. So, in the case of taking away a workman's tools, the natural and necessary consequence is the loss of employment: *Bodley v. Reynolds.*[29] The following cases may be referred to as decisions upon the principle within which the defendants contend that the present case falls: *Jones v. Gooday,*[30] *Walton v. Fothergill,*[31] *Boyce v. Bayliffe*[32] and

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27 *Waters v. Towers,* (1853) 8 Ex. 401 : 22 L.J. 186 : 155 E.R. 1404.
28 *Borradaile v. Brunton,* 20 R.R. 548 (8 Taunt. 535).
29 *Bodley v. Reynolds,* 70 R.R. 640 (8 Q.B. 779).
30 *Jones v. Gooday,* 58 R.R. 649 (8 M. & W. 146).

Archer v. Williams.[33] The rule, therefore, that the immediate cause is to be regarded in considering the loss, is applicable here. There was no special contract between these parties. A carrier has a certain duty cast upon him by law, and that duty is not to be enlarged to an indefinite extent in the absence of a special contract, or of fraud or malice. The maxim *"dolus circuitu non purgatur,"* does not apply. The question as to how far liability may be affected by reason of malice forming one of the elements to be taken into consideration, was treated of by the Court of Queen's Bench in *Lumley v. Gye.*[34] Here the declaration is founded upon the defendants' duty as common carriers, and indeed there is no pretence for saying that they entered into a special contract to bear all the consequences of the non-delivery of the article in question. They were merely bound to carry it safely, and to deliver it within a reasonable time. The duty of the clerk, who was in attendance at the defendants' office, was to enter the article, and to take the amount of the carriage; but a mere notice to him, such as was here given, could not make the defendants, as carriers, liable as upon a special contract. Such matters, therefore, must be rejected from the consideration of the question. If carriers are to be liable in such a case as this, the exercise of a sound judgment would not suffice, but they understood," said PATTESON, J., in *Kelly v. Partington,*[35] "that the special damage must be the natural result of the thing done." That sentence presents the true test. The Court of Queen's Bench acted upon that rule in *Foxall v. Barnett.*[36] This therefore is a question of law, and the jury ought to

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31 *Walton v. Fothergill,* (1835) 7 C. & P. 392.
32 *Boyce v. Bayliffe,* 1 Camp. 58.
33 *Archer v. Williams,* (1846) 2 C.& K. 26.
34 *Lumley v. Gye,* 95 R.R. 501 : 2 El. & Bl. 216.
35 *Kelly v. Partington,* 5 B. & Ad. 651.
36 *Foxall v. Barnett,* 95 R.R. 906 : 2 El. & Bl. 928.

have been told that these damages were too remote; and that, in the absence of the proof of any other damage, the plaintiffs were entitled to nominal damages[37] only: *Tindall v. Bell*.[38] *Siordet v. Hall*[39] and *De Vaux v. Salvador,*[40] are instances of cases where the Courts appear to have gone into the opposite extremes – in the one case of unduly favouring the carrier, in the other of holding them liable for results which would appear too remote. If the defendants should be held responsible for the damages awarded by the jury, they would be in a better position if they confined their business to the conveyance of gold. They cannot be responsible for results, which, at the time the goods are delivered for carriage, are beyond all human foresight. Suppose a manufacturer were to contract with a coal merchant or mine owner for the delivery of a boat-load of coals, no intimation being given that the coals were required for immediate use, the vendor in that case would not be liable for the stoppage of the vendee's business for want of the article which he had failed to deliver: for the vendor has no knowledge that the goods are not to go to the vendee's general stock. Where the contracting party is shown to be acquainted with all the consequences that must of necessity follow from a breach on his part of the contract, it may be reasonable to say that he takes the risk of such consequences. If, as between vendor and vendee, this species of liability has no existence, a fortiori the carrier is not to be burthened with it. In cases of personal injury to passengers, the damage to which the sufferer has been held entitled is the direct and immediate consequence of the wrongful act.

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37 *Hadley v. Baxendale,* (1854) 9 Ex. 341 at p. 353.
38 *Tindall v. Bell,* 63 R.R. 584 : 11 M. & W. 232.
39 *Siordet v. Hall,* 29 R.R. 651 : 4 Bing. 607.
40 *De Vaux v. Salvador,* 43 R.R. 474 : 4 Ad. & El. 420.

The judgment of the COURT was now delivered by ALDERSON, B.:

"We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient[41] and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, if till, in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and in *Blake v. Midland Railway Company,*[42] the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at *Nisi Prius*."

There are certain established rules," "this Court says, in *Alder v. Keighley,*[43] "according to which the jury ought to find." And the Court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract

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41 *Hadley v. Baxendale,* (1854) 9 Ex. 341 at p. 354.
42 *Blake v. Midland Railway Company,* 88 R.R. 543 : 18 Q.B. 93.
43 *Alder v. Keighley,* 71 R.R. 592 : 15 M. & W. 117.

should be[44] either such as may fairly and reasonably be considered arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think, the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under

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[44] *Hadley v. Baxendale,* (1854) 9 Ex. 341 at p. 355.

the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to[45] send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special

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[45] *Hadley v. Baxendale,* (1854) 9 Ex. 341 at p. 356.

circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute."

The Court puts the aforesaid unique concept in very loud and clear words, which is popularly known as Remoteness of Damages. Constant reference of the said concept in later cases make it must that the relevant passage to be quoted in as it is manner. In addition to the aforesaid relevant paragraph of the judgment, the General Rule upon which this was based was enunciated by Alderson B. delivering the Court's judgment, and its great importance and the constant reference made to it in later cases require the relevant passage to be quoted in full. The landmark passage dictated by Alderson B. runs thus:

"We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought

to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, would only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances been known the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

Accordingly, the Court rejected the claim on the ground that the facts, which the defendants were held, to know were not sufficient to "show reasonably that the profits of the Mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carriers to the third person."

The phraseology of the said judgment can be broadly divided into three parts. Those three parts are three golden rules to measure damages arising out of breach of contract. From the above passage itself we can make out those three different situations, which provide three golden rules. Those rules have been deduced as below:

Damages naturally arising from a breach of contract according to the usual course of things are always recoverable.

Damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broker the contract.

Where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damages complained of flows naturally from the breach of the contract in those special circumstances, such special damage must be supposed to have been contemplated by the parties to the contract and is recoverable.

8.4 DAMAGES NATURALLY ARISING:

The First Rule laid down in *Hadley v. Baxendale*.[46]

Any damages, which are naturally arising out of any breach of contract, the same is recoverable by the party who has been put to suffering from such a breach. As night follows

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[46] *Hadley v. Baxendale,* (1854) 9 Ex. 341.

day, the loss, which arises from the breach of contract, must directly flow from it, that seems to be the basic idea of using the word 'naturally' by Alderson B. while delivering the landmark judgment. However, there is no test prescribed, to judge whether a particular thing is a natural result of another. To call a thing the natural result of a particular act or omission is to say that it is produced in the normal course of events without the aid of adventitious accidental circumstances. The said word is explained by Lord Sumner in his landmark decision of *Weld-Blundell v. Stephens.*[47] In very loud and clear though in a very simple manner Lord Sumner said, "everything that happens, happens in the order of nature, and is, therefore, natural." The only way to approach the question is to see whether according to the judgment of a reasonable man a particular result would have occurred as a direct consequence of which the complaint of a grievance is being made before the Court by the aggrieved party in circumstances which are not peculiar in themselves. As Pollock and Mulla has rightly pointed out that "the first rule in Hadley v. Baxendale is only specification of simple cases under the second, for the natural and ordinary consequences of an event are always assumed to be in the contemplation of reasonable men and it is no excuse for a man to say that he failed to think reasonably or did not think at all."[48]

Here it is pertinent to draw an attention to thin line difference about those cases in which Court held that though admittedly the damage is caused to a plaintiff as a direct result of defendant's conduct, the plaintiff should not qualify for the compensation. There the Court asked the

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47 *Weld-Blundell v. Stephens,* (1920) A.C. 956 at p.984.

48 C. Kemeshwara Rao, 6th Edition, (2005), Vol.I, p.162, *Law of Damages and Compensation,* Law Publishers (India) Pvt. Ltd.

question that what kind of damage is the plaintiff entitled to recover compensation? Damage of the most catastrophic and unusual nature may ensue from breach but on practical ground the law takes the view that these cases should fall under the category where a line must be drawn and the plaintiff's claim for recovery of damage is required to be rejected. In a renowned judgment of *Liesbosch Dredger v. SS Edison,*[49] Lord Wright stated the aforesaid concept as below:

"The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes', or consequences of consequences.... In the varied web of affairs the law must abstract some consequences as relevant, not perhaps on grounds of pure logic, but simply for practical reasons".

8.5. KNOWLEDGE ABOUT NATURAL OR ORDINARY CIRCUMSTANCE:

A person who has suffered loss from a breach of contract can certain take any reasonable step that are available to mitigate the extent of the damage caused by the breach. The innocent party is required to be compensated by the party in default for loss, which is really due because of the breach committed, by the other party. The party committing a breach is not allowed to take shelter under the roof of words that "he failed to think reasonably or did not think at all" as the law presumes that the natural and ordinary consequences of an event are always assumed to be in the contemplation of reasonable prudent men. The simplest cases arising under the first rule are ordinary cases of non-

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49 *Liesbosch Dredger v. SS Edison,* (1933) A.C. 449 at p. 460.

payment of money and non-delivery of goods. In case of non-payment of money, the party complaining the breach is entitled to be compensation for loss of interest and the reasonable expenses of recovering the amount, for the law assume that he can obtain the money elsewhere on payment of interest. While in the case of non-delivery of goods, the plaintiff is expected to go into the market and purchase the goods, and, if he is to pay a higher price he can recover, as compensation the difference which he paid and the price at which he agreed to purchase as per contract agreed upon by the parties. As the price of different articles varies according to the demands of the season, the plaintiff may not have suffered any loss if the price he pay be less than the contract price. In both cases, therefore, the loss, which arises to the plaintiff, is the natural result of the defendant's breach and it is a loss, which the defendant may reasonably be supposed to have contemplated. In a landmark decision of *Inchbald v. Western Neilgherry Coffee Plantation,*[50] the said concept is nicely reanalyzed in the following words, "the measure of general damages is pecuniary difference between the state of plaintiff upon the breach of contract and what it would have been if the contract would have been performed, in other words, it is the value of the performance of the plaintiff and not the cost of the performance to the defendant.

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50 *Inchbald v. Western Neilgherry Coffee Plantation,* (1864) 34 L.J. C.P. 15; *Michael v. Hart & Co.,* (1902)) 1 K.B. 482; *Wigsell v. School for Indigent Blind,* (1882) 8 Q.B. D. 357

8.6 DAMAGES ARISING OUT OF SPECIAL CIRCUMSTANCES:

The second rule in *Hadley v. Baxendale.*[51]

Damages, which are arising out of special circumstances, are covered under the head of "Special Damages" in the second rule in the case of Hadley v. Baxendale. It was decided in the very case that the plaintiff could recover damages arising under special circumstances if the special circumstances were known to the person who is guilty of the breach of contract. This rule clearly states that damages which could not arise in usual course of things from the breach of contract but which do arise from the circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has committed breach of contract. There are four core questions to be answered before the special damage claim can be held recoverable, in order to apply the second rule which is stated hereinabove. Those four core questions are as under:

(1) What are the damages, which actually resulted from the breach of contract?

(2) Was the breach of contract made under special circumstances and, if so, what are they?

(3) What, at the time of making the contract, was the common knowledge of both parties? And

(4) What may the Court reasonably suppose to have been in the contemplation of the parties as the probably

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51 *Hadley v. Baxendale,* (1854) 9 Ex. 341.

result of a breach of the contract assuming the parties to have applied their minds to the contingency of there being such a breach?[52]

8.7 KNOWLEDGE ABOUT SPECIAL CIRCUMSTANCES:

The rule of legal jurisprudence is that the person must have intention or knowledge for the wrong he is committing to hold him guilty for that particular wrong. It may be either because of commission of the act or omission of the act, likewise in other act. Here in second rule also "knowledge" of the special circumstances under which the contact is made is must i.e. condition sine qua non. But the million dollar question arises is, whether, mere knowledge of circumstances entails, the liability to pay damages which arose under those circumstances upon the party who commits the breach of the contract agreed between the parties?

In the landmark decision of *British Columbia Saw Mill Co. v. Nettleship,*[53] Justice Wills answers this question in the most beautiful frame of mode. Justice Wills observed, "the mere fact of knowledge cannot increase the liability. Knowledge must be brought home to the party charged, under such circumstances, that he must know that the person he contracts which reasonably believes that he accepts the contract with the special condition attached to it. It may be that the knowledge is acquired casually from a stranger, a person to whom the goods below not knowing or carrying whether he has such knowledge or not. Knowledge, in fact can only be evidence of fraud or of an

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52 *Hammond v. Bussey,* (1888) 20 Q.B.D. 79.

53 *British Columbia Saw Mill Co. v. Nettleship,* (1868) L.R. 3 C.P. 499 at p. 500.

understanding by both parties that the contract is based upon the circumstances which is communicated."

There are certain framers of contract who are vigilant at the time of drafting clauses, terms and conditions of contract. Those contracts contain the express clause for breach of contract, consequences for breach of contract, sometimes more specifically a clause for special damages which can be asked for in special circumstances of breach. Such cases create no difficulty at all or little less difficulty at the time of mitigating the exact amount of damages for breach of contract.

When special circumstances are not expressly provided in terms of contract, damages have some times being assessed on the basis of an implied knowledge of special circumstances, which the defendant may be presumed to know. E.g. In a renowned case of *Hammond v. Bussey,*[54] the defendant contracted for the sale of coal of a particular description to plaintiffs, knowing that they were purchasing such coal for the purpose of reselling it as coal of the same description. The coal delivered by the defendant to the plaintiffs, which they in turn delivered to the vendees, did not answer to the description, but this could not be ascertained by inspection of the coal and only became apparent after the use by the vendees. The sub-vendees brought an action against the plaintiff for breach of contract. Plaintiffs gave notice of action against the defendants, who, however, repudiated all liabilities and insisted that the coal was according to the contract.

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54 *Hammond v. Bussey,* (1888) 20 Q.B.D. 79.

The plaintiffs defended the action against them, but at the trial the coal was found to be not according to contract and the sub-vendees accordingly recovered damages from the plaintiffs. Plaintiffs thereupon sued the defendant for breach of contract, claiming as damages the amount of the damages recovered from them and the costs, which had been incurred in the former action. Defendant paid the amount of the damages in the previous action, but dented his liability in respect of his costs. It was held that the defence of the previous action being, under the circumstances, reasonable, the costs incurred by the plaintiffs as defendants in such action were recoverable as being damages which might be supposed to have been in the contemplation of the parties at the time when they made the contract as the probable result of a breach of it. It will be observed, that in this case, the rule relating to special damages, arising from special circumstances, has been extended by the Court to the case of a sub-contract not yet actually made at the time of the contract, but which will probably or in the ordinary course of things is sure to be made.

8.8 PROBABILITY ONLY DENOTES A CHANCE OF HAPPENING OF A THING:

The element of probability involved in the second rule in *Hadley v. Baxendale,*[55] has, still further, recently, been extended by the Court of King's Bench and the Judicial Committee of the Privy Council in the under-mentioned cases where there is a string of buyers and sellers.[56] Therein, the plaintiffs were awarded (1) damages recovered

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55 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

56 *Kashler & Cohen v. Slavouski,* (1928) 1 K.B. 78; *Hope Prudhomme & Co. v. Hamel & Harvey,* I.L.R. 49 Mad. 1; *Biggin & Co. v. Germanite Ltd.,* (1950) 2 All. E.R. 859, (1951) 2 All. E.R. 191 (C.A.).

by the last buyer from the last seller, (2) the costs of both sides in the action, and (3) a sum in respect of costs incurred by all the intermediate holders including the plaintiffs, in connection with the claims made against each of them by their respective intermediate purchasers. The word "probability" as used in *Hammond v. Bussey,*[57] for bringing in the liability for special damages must not, under the authorities be taken to mean that the chances are all in favour of the event happening. As Lord Dunedin observed, "to make a thing probable it is enough, in my view, that there is an even chance of its happening".[58] Lord Shaw observed in the same case, "I would venture to read that as a sub-contract which the ordinary course of business, was not likely to be made". Thus, if an event is not unlikely to happen in the usual course of business it would come under the head of probability.

8.9 DAMAGES ARISING OUT OF SPECIAL CIRCUMSTANCES WHICH ARE KNOWN TO THE PARTIES:

The third rule in *Hadley v. Baxendale.*[59]

It may be pointed out that subsequent cases have considerably modified it to the effect that it is not enough that the party sought to be made liable should be informed that the breach of contract will result in a particular kind of loss.[60] It must be shown that, on being informed of the special circumstances in which the loss will be incurred, he had entered into the contract subject to that liability. In

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57 *Hammond v. Bussey,* (1887) 20 Q. B.D. 79.

58 *R. & H. Hall, Ltd. v. W.H. Pin. (Junior) & Co.,* (1928) 33 Com. Cas. 324

59 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

60 *British Columbia Saw Mill Co. v. Nettleship,* (1868) L.R. 3 C.P. 499; *Horne v. Midland Rly. Co.,* (1873) L.R. 8 C.P. 131.

other words, information or notice must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss. Such information, however, must be given at the time of entering into the contract. If it be given at a later date, whether it is of circumstances which were contemplated by the party giving such information at the date of the contract, or of those which arose at a later date, it is not sufficient to fix the responsibility of the defendant for that particular loss.[61]

8.10 LIABILITY FOR SPECIAL CIRCUMSTANCES WHEN ARISES:

The rule says where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract, under those special circumstances, such special damage must be supposed to have been contemplated by the parties to the contract and is recoverable. It is obvious that this rule goes far beyond what law can ever intend. It is possible to contend, that the mere fact of the communication of the special circumstances attending upon the bargain, makes the defaulting party liable for the special consequences unless, he consented to undertake such liability, on being informed, at the time of the contract that he would be held answerable for them. It will be perceived that no one who has entered into a contract, will agree to enlarge his responsibility beyond the natural and ordinary consequences of a breach by him, unless upon special terms. It is open to him to refuse to enter into the contract at all, if an option is left to him. In fact, without a contract to that effect, it would be

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61 *Hydraulic Engineering Co. v. McHaffie,* (1878) 84 Q.B.D. 670; *Smeed v. Ford,* (1859) I.E. & E. 602.

most inequitable to fasten a liability upon him which the law would not have implied and the injustice will be all the more great in cases where the party has no option to refuse and has no power to stipulate for special terms.

This view, however, has not found favour with the Court of Appeal in England, because “it cannot be said that damages are granted because it is part of the contract that they shall be paid, it is the law which imposes or implies the term that upon breach of a contract damages must be paid”.[62] It is clear that parties do not enter into a second contract to pay damages in the event of a breach thereof; they only expect that performance will be made in its due time, for it is the very thing they contemplate at the time of the contract and not its probable breach. There may no doubt be cases in which the parties to a contract provide for its breach but in those cases, the damages will be stipulated and need not be determined according to the above principles.

But in the subsequent case of *Simpson v. London & North Western Railway Co.*[63] the above suggestion was qualified to this extent that if the special circumstances are already within the knowledge of the party breaking the contract, the formality of communicating them to him may not be necessary.

The plaintiff was in the habit of exhibiting samples of his implements at cattle shows. He delivered his samples to the defendant company for consignment to the show grounds at New Castle. The consignment note said: “must be at New Castle on Monday certain”. But no mention was made of the

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62 *Hydraulic Engineering Co. v. McHaffie,* (1878) 84 Q.B.D. 670.

63 *Simpson v. London & North Western Railway Co.,* (1876) 1 Q.B.D. 274..

intention to place the goods in the exhibition. On account of negligence the goods reached only after the show was over.

But as the company was already aware of the object of carrying the goods there, the plaintiff was allowed to recover not only the loss of freight but also the profits he would have made by placing the goods at the show. COCKBURN, CJ said:

The principle is now well-settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or the circumstances are known to the carrier, from which the object ought in reason to be inferred, so that the object may be taken to have been in the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.

In other case,[64] a fragmentiser was purchased by the plaintiff under a hire-purchase agreement. Its rotor broke down before normal life. The plaintiff had no means to replace it at cash price. He had to arrange it again at a hire-purchase price and claimed the same as damages. The defendant contended that the plaintiff had to pay hire-purchase price because of his lack of means. This contention was rejected. The fact that in the present circumstances of economy business has to depend upon hire-purchase system was held to be within the contemplation of parties.

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64 *B.P. Exploration & Co. v. Hont,* (1982) 1 All ER 925 : (1983) 2 A.C. 352 : (1982) 2 W.L.R. 253, *Jaques v. Millar,* (1877) 6 Ch D 153.

8.11 NO RECOVERY OF SPECIAL DAMAGES WHEN SPECIAL CIRCUMSTANCES ARE NOT KNOWN TO THE PARTIES:

Lack of knowledge of special circumstances once again prevented recovery of special damages in *Home v. Midland Railway Company.*[65]

The plaintiffs, a firm of shoe manufacturers contracted to supply a quantity of shoes to a firm in London for the use of the French army at an unusually high price. The shoes were to be delivered by the 3rd of February. The consigned the shoes with the defendant railway company telling them that the consignment must reach by the 3rd, but not that there was anything exceptional in the contract. The consignment was delayed and the consignee refused to accept it. The plaintiffs had to sell them in the market at about half their contract price.

In the action against the defendants for the delay in delivering the shoes, they paid into the court a sufficient sum to cover any ordinary loss occasioned thereby, but the plaintiffs further claimed the difference between the price at which they had contracted to sell the shoes and the price, which they ultimately fetched. But it was held that this was a damage of an exceptional nature and it could not be supposed to have been in the contemplation of the railway company when it contracted to convey the goods by the 3rd.

For the same reason loss of profits was not allowed to be recovered in *British Columbia Saw Mill Co. v. Nettleship.*[66]

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65 *Home v. Midland Railway Company,* (1873) L.R. 8 C.P. 131.

66 *British Columbia Saw Mill Co. v. Nettleship,* (1868) LR 3 CP 499; 18 LT 604.

The parts of a sawmill machinery, packed in cases, were given to the defendant, a carrier, for carriage to Vancouver. One of the cases was lost and consequently a complete mill could not be erected and operated. The plaintiff claimed the cost of lost machinery and the profits, which could have been earned if the mill had been installed in time.

The Court allowed only the cost in Vancouver of the articles lost. The loss of profits to be made from the intended use of the mill was held to be too remote. WILLES J gave the following illustration in support of this conclusion:

Take the case of a barrister on his way to practice at the Calcutta Bar, where he may have a large number of briefs awaiting him, through the default of the Peninsular and Oriental Company he is detained in Egypt or in the Suez boat, and consequently sustains great loss; is the company to be responsible for that, because they happened to know the purpose for which the traveller was going?[67]

WILLES J further pointed out that special damages are recoverable only when the special purpose of the contract "is brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.[68]

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67 *Kadappa Mudaliar v. Muthuswami Ayyar*, (1926) 50 Mad 94 : AIR 1927 Mad 99.

68 Similarly, in *Dominion of India v. All India Reporter Ltd.,* AIR 1952 Nag 32, loss by railways of three volumes of a set of books without which the set became useless, recovery allowed only for the lost volumes, the goods were described only as a bundle of books without any indication of the importance of a volume. In *Hydraulic Engg. Co. v. McHaffie,* (1878) 4 QBD 670, the defendant failed to supply an essential part of a machine about which he knew that his buyer was under a contract to supply to a third party, he was held liable for the plaintiff's loss of profit.

Three golden rules for determining the liability:

In Mayne on Damages,[69] after an examination of the authorities, the following rules have been substituted in the place of the third rule in *Hadley v. Baxendale:*[70]

(1) Where special circumstances connected with a contract may cause special damage if it is broken, mere notice of such special circumstances given to one party will not render him liable for the special damage, unless it can be inferred that he consented to be liable for such special damage.

(2) Whether a person with knowledge or notice of special circumstances might refuse to enter into contract, or might demand a higher remuneration for entering into it, the fact that he accepts the contract without requiring any higher rate will be evidence, though not conclusive evidence, that he had accepted the additional risk in case of breach.

(3) Whether the defendant has no option of refusing the contract, and is not at liberty to require a higher rate of remuneration, the fact that he proceeded with the contract after knowledge or notice of special circumstances is not a fact from which an undertaking to incur a liability for special damages can be incurred.

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69 Mayne, 10th Ed., p. 36; *Law of Damages, Paula Lee Ltd. v. Robert Zehil and Ltd.,* (1983) 2 All. E.R. 390 (Q.B.D.).

70 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

The authorities, relied upon in Mayne's work for deducing the above three rules are the under mentioned cases which Courts shall have occasion to discuss in their relation to the illustrations given to Sec.73 of the Indian Contract Act.[71]

8.12 THE RULE RESTATED IN *VICTORIA LAUNDRY v. NEWMAN*:[72]

In *Victoria Laundry v. Newman* the plaintiffs, launderers and dyers, claimed successfully for loss of general business profits arising from the defendant's delay in delivering a boiler he had sold to them, the defendant being aware of the nature of the plaintiff's business and that they intended to put the boiler into use in the shortest possible time. In granting these damages the Court of Appeal restated the principles as laid down in *Hadley v. Baxendale,*[73] and the relevant passage from the judgment of the court, delivered by Asquith L.J., puts the matter so clearly that it deserves full quotation. In the view of the court the propositions, which emerged from the authorities as a whole, were these:

"(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however, improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

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71 *British Columbia Saw Mill Co. v. Nettleship,* (1868) L.R. 3 C.P. 499; *Horne v. Midland Rly. Co.,* (1873) L.R. 8 C.P. 131; *Elbinger Actien Gesellschaft v. Armstrong,* (1874) L.R. 9 Q.B. 473; *Simpson v. London North Western Rly. Co.,* (1876) 1 Q.B. 274.

72 *Victoria Laundry V. Newman,* (1949) 2 K.B. 528, C.A.

73 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties, or , at all events, by the party who later commits the breach.

(4) For this purpose, knowledge `possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the `ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the `first rule' in *Hadley v. Baxendale*.[74] But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the `ordinary course of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the `second rule' so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the

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[74] *Hadley v. Baxendale,* (1854) 9 Exch, 341.

question, he would as a reasonable man have concluded that the loss in question was liable to result.

(6) Nor, finally, to make a particular loss recoverable, need it be provided that upon a given state of knowledge the defendant could, as a reasonable man, foresee that t breach must necessarily result in that loss. It is enough ... if he could foresee it was likely so to result. It is indeed enough if the loss (or some factor without which it would not have occurred) is a `serious possibility' or a `real danger.' For short, we have used the word `liable' to result. Possibly the colloquialism `on the cards' indicates the shade of meaning with some approach to accuracy."[75]

There are two factors in this lucid restatement of principle, which stand out. The first is that the test of the extent of liability is reasonable foresseability, as stated in the second proposition and further defined in the fifth and sixth propositions. The second is that what is reasonably foreseeable depends upon knowledge, actual or imputed, as stated in the third proposition and further defined in the fourth proposition. However, before considering these important criteria in detail, it is necessary to look at the qualifications introduced on the first of them by the House of Lords in *Czarnikow v. Koufos.*

8.13 THE RESTATED RULE QUALIFIED IN *CAZRNIKOW v. KOUFOS*: [76]

In *Czarnikow v. Koufos* where the House of Lords upheld the claim of charterers to recover for the shipowner's late delivery of a consignment of sugar the difference between

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75 *Victoria Laundry V. Newman,* (1949) 2 K.B. 528, C.A.
76 *Czarnikow v. Koufos,* (1969) 1 A.C. 350.

the market prices of sugar at due delivery and at actual delivery, their Lordships subjected to a thorough examination Asquith L.J.'s restatement of principle in *Victoria Laundry V. Newman*, expressing "varying degrees of enthusiasm" for it.[77] Lord Reid was particularly critical. His main attack was on Asquith L.J.'s use of the test of reasonable foreseeability. "To bring in reasonable foreseeability ", he said "appears to me to be confusing measure of damages in contract with measure of damages". Lord Reid was satisfied that for contract the court in *Hadley v. Baxendale:*[78]

"Did not intend that every type of damage which was reasonably foreseeable by the parties when the contract was made should either be considered as arising naturally, i.e. in the usual course of things, or be supposed to have been in the contemplation of the parties. Indeed the decision makes it clear that a type of damage which was plainly foreseeable as a real possibility but which would only occur in a small minority of cases cannot be regarded as arising in the usual course of things or be supposed to have been in the contemplation of the parties: the parties are not supposed to contemplate as grounds for the recovery of damage any type of loss or damage which on the knowledge available to the defendant would appear to him as only likely to occur in a small minority of cases."

Accordingly, in Lord Reid's opinion, the proper test is whether the loss in question is:

"Of a kind which the defendant, when he made the contract, ought to have realized was not unlikely to result from the

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77 Aruna Mills v. Dhanrajmal Gobindram, (1968) 1 Q.B. 655 at 668.

78 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

breach...the words `not unlikely'... denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable".

Having formulated the test in this way, Lord Reid then proceeded to jettison all of the related phrases, which Asquith L.J. had introduced in his restatement. He took exception to "liable to result" because he thought that "one would usually say that when a person foresees a very improbable result he foresees that it is liable to happen", he considered that:

"In the ordinary use of language there is a wide gulf between saying that some event is not unlikely or quite likely to happen and saying merely that it is a serious possibility, a real danger, or on the cards".

While far less sweeping in their condemnation of Asquith L.J.'s terminology the rest of Their Lordships basically agreed with Lord Reid's analysis. Thus Lord Upjohn specifically agreed that the terminology of reasonable foreseeability was to be avoided, for the assessment of damages as between contracting parties "should depend on their assumed common knowledge and contemplation and not on a foreseeable but most unlikely consequence"; the others in effect accepted that the kinds of loss for which recovery is to be allowed are those which are not unlikely to result from breach, much reliance being placed on the House's earlier decision in *Hall v. Pim*[79] which, as Lord Reid rightly said:

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79 *Hall v. Pim,* (1928) 33 Com.Cas. 324, H.L.

"Must be taken to have established that damages are not to be regarded as too remote merely because, on the knowledge available to the defendant when the contract was made, the chance of the occurrence of the event which cause the damage would have appeared to him to be rather less than an even chance."[80]

At the same time, while Their Lordships were unanimous in rejecting the colloquialism "on the cards" as far too imprecise and even "capable of denoting a most improbable and unlikely event", the expression "a serious possibility" and "a real danger" commended themselves to the majority of the House as correctly giving the required shade of meaning. "Liable to result" was generally regarded as a convenient, innocuous phrase, which did not really advance the matter further. (Lord Pearce thought the words "ambiguous" but "useful as shorthand for a collection of definable ideas". Lord Hudson thought the expression "colourless" but one on which he did "not find it possible to improve".)

Yet it is fair to say that, taken as a whole, Asquith L.J.'s careful restatement in *Victoria Laundry V. Newman,*[81] has survived the various strictures appearing in Their Lordship's speeches. For Lord Morris, Asquith L.J.'s "illuminating judgment" was "a most valuable analysis" of the *Hadley v. Baxendale,*[82] rule; for Lord Pearce, it was "a justifiable and valuable clarification of the principles which Hadley v. Baxendale was intending to express. Donaldson J. In *Aruna Mills v. Dhanrajmal Gobindram*[83] expressed the opinion that,

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80 *Czarnikow v. Koufos,* (1969) 1 A.C. 350.
81 *Victoria Laundry V. Newman,* (1949) 2 K.B. 528, C.A.
82 *Hadley v. Baxendale,* (1854) 9 Exch, 341.
83 *Aruna Mills v. Dhanrajmal Gobindram,* (1968) 1 Q.B. 655.

subject to two qualifications introduced by Their Lordships, namely the minor one of the rejection of the colloquialism "on the cards" and the major one that the references to losses as being reasonably foreseeable should now be read as referring to losses as having been in the parties' contemplation, *Victoria Laundry v. Newman,*[84] "remained unimpaired as the classic authority on the topic" of remoteness in contract. Certainly, no doubts were cast upon Asquith L.J.'s second criterion, that liability depends upon actual or imputed knowledge, and even the objection to his first criterion of reasonable foreseeability was really that it was liable to be misunderstood rather than that it was necessarily wrong, for Lord Reid admitted that, in using the phrase ", reasonably foreseeable", Asquith L.J. may well have meant foreseeable as a likely result. Indeed, as Lord Upjohn pointed out,

"As a matter of language there will in many cases be no great difference between foreseeing the possibility of an event happening and contemplating the possibility of that event happening and in some of the cases, from Blackburn j. in *Cory v. Thames Ironworks Co.*[85] onwards the word foresee or foreseeable is used in connection with contract".

8.14 CONCLUSION:

To this end *Hadley v. Baxendale* defines the kind of damage i.e. appropriate subject of damages and excluded all other kinds as being too remote. The decision was concerned solely with what is correctly called remoteness of damage, and it will conduce to clarity if this expression is reserved for cases wherein the defendant denies liability for certain

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84 *Victoria Laundry v. Newman,* (1949) 2 K.B. 528, C.A.

85 *Cory v. Thames Ironworks Co.,* (1968) L.R. 3 Q.B. 181.

consequences that have followed from his breach. The other question is which must be kept quite distinct from the aforesaid, concerns the principle upon which damage could be evaluated or quantified in terms of money. This may appropriately be called the question of measurement of damages. The principle adopted by the Courts in many cases dating back to at least 1848 is that of restitutio in integrum. If the plaintiff has suffered damage that is not too remote, he must, so far as money can do it, be restored the position he would have been in had that particular damage not occurred. From the aforesaid discussion, it is now crystal clear that what is awarded under heading of damages for breach of contract is, what is to be the loss which the plaintiff has suffered and not the profit which the defendant has made.

However, the phraseology of the judgment of *Hadley v. Baxendale*[86] has been criticized on many occasions, most particularly the expression “arising naturally” and “probable consequences” by Lord Sumner in *Weld-Blundell v. Stephens.*[87]

The term “direct consequences” achieved a certain vogue in contract, but this term is only properly applicable to causation aspect of remoteness. Indeed, may of the suggested alternatives have themselves been criticized. Also there was a tendency that first to regard the rule established by the judgment as three rules, and then as two rules, the first dealing with the ordinary case and the second dealing with the case where there were known special circumstances. These two factors, namely the

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86 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

87 *Weld-Blundell v. Stephens,* (1920) A.C. 956 at 983.

abundance of phraseology and the breakdown of the rule into parts, led to confusion, and a restatement of the rule for modern conditions became a real need. This restatement came with the Court of Appeal decision in 1949 in *Victoria Laundry V. Newman,*[88] so that today the intervening discussions of phraseology and classifications of the rule are only a matter of history.

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88 *Victoria Laundry V. Newman,* (1949) 2 K.B. 528, C.A.

CHAPTER - IX

KINDS OF DAMAGES

9.1 INTRODUCTION:

Although categorization into types is difficult in the case of financial loss, loss of ordinary business or profit is different. From loss falling from a particular contract, which gives rise to very high profits whereas non-writing loss sees of a fair large magnitude than any contemplated work of the same type as those foreseeable. In the context of physical injury it is established that the word 'damage' refers to the type of damage in question; it is not necessary for a plaintiff to go further and show contemplation of the exact nature of the damage that has arisen, or the amount of damage of the type or kind. Although it has been said that the same principles apply to cases of loss of profit,[1] so this is difficult to reconcile with the decision of the Court of Appeal in the *Victoria Laundry case*[2] in which the 'ordinary' loss of profits were recovered but not that from the highly lucrative Ministry of Supply contracts.[3]

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1 *Parsons (H.) Livestock) Ltd. v. Uttley Ingham & Co. Ltd.,* (1978) Q.B. 791, *Wroth v. Tyler* (1974) Ch.30, *Transworld Oil Ltd. V. North Bay S.S. Cpn.* (1987) 2 Lloyd's Rep. 173, *Brown v. K.M.R. Services Ltd.* (1994) 4 All E.R. 385,*Homsy v. Murphy* (1997) 73 P. & C.R. 26.

2 *Victoria Laundry V. Newman,* (1949) 2 K.B. 528, C.A.

3 *Islamic Republic of Iran S.S. Lines v. Ierax S.S. Co. of Panama* (1991) 1 Lloyd's Rep. 81, *Brown v. K.M. R. Services Ltd.* (1995) 4 All E.R. 598.

9.2 NATURE OF DAMAGES:

9.2.1 Damages Arising in Usual Course of Things:

It will now be convenient to examine separately the operation of each branch of the rule, in view of the fact that each covers a different degree of knowledge possessed by the contracting parties. The first branch of the rule in *Hadley* v. *Baxendale*[4] deals with such damage as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from the breach of contract, as the probable result of the breach. It depends, as we have seen, on the knowledge which the parties are presumed to possess and the scope of the contractual duty undertaken.[5]

(I) Normal business position of parties:

Damages will not be too remote if they flow from the normal business position of the parties, for the Court will assume that this is known to both of them. In *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (AIB),*[6] the facts of which are summarized, as a result of the diversion of the delayed vessel to Glasgow the purchasers of the cargo of soya incurred expenses in having them forwarded to the contractual destination in Sweden.

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4 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

5 *South Australia Asset Management Co. v. York Montague Ltd.* (1997) A.C. 191.

6 *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (AIB),* (1949) A.C. 196.

The House of Lords held that the purchasers were entitled to recover this cost. Lord Wright pointed out that the question in all such cases must always be 'what reasonable business men must be taken to have contemplated as the natural or probable result if the contract was broken. As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business'.[7] In this case, the possibility of war must have been present in the minds of the parties, and experienced business people would know that one of the risks that would be consequent upon prolongation of the voyage at that time would be the diversion of the vessel by the order of the Admiralty. The cost of transshipment was therefore not too remote a consequence of the unseaworthiness of the ship.

(II) Market fluctuations:

The Sale of Goods Act 1979 contains statutory provisions for the assessment of damages for breach of a contract of sale, which are founded on the first branch of the rule in *Hadley* v. *Baxendale.*[8] But the first branch of the rule applies where the seller fails to deliver or is late in delivering what is on the face of it obviously a profit-earning chattel, for instance, a merchant or passenger ship, or some essential part of such a ship.[9] In such cases the party injured will be entitled to recover the loss of profit, which might reasonably be expected to arise if the contract were broken.[10]

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7 *Bulk Oil v. Sun International*. (1984) 1 Lloyd's Rep. 531.

8 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

9 *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* (1949) 2 K.B. 528, *Fletcher v. Tayleur* (1855) 17 C.B. 21; *Saint Lines v. Richardsons Westgarth & Co.* (1940) 2 K.B. 99.

10 *Cory v. Thames Ironworks & S.S. Co.,* (1868) L.R. 3 Q.B. 181; *Fyffes Group Ltd. v. Reefer Express Lines Pty Ltd.;* (1996) 2 Lloyd's Rep. 171.

In contracts for the carriage of goods, if, by default of a carrier, the goods which he has contracted to deliver are lost or delayed in transit, certain loss will ordinarily be assumed to have been suffered by the consignee as the natural and probable result of the breach. In the case of loss, the normal measure of damages is the market value of the goods at the time when they ought to have arrived, less the freight payable on safe delivery.[11] In the case of delay in delivering the goods, it is the difference between the market value of the goods on the day on which they ought to have arrived and their market value on the day on which they did arrive.[12] Thus, in *Koufos* v. C. *Czarnikow Ltd.:*[13]

The respondent, a sugar merchant, chartered the ship Heron II from the appellant to carry a cargo of sugar from *Con stanza to Basrah*. The ship deviated without authority from the agreed voyage, with the result that the cargo was delayed. Owing to a fall in the market for sugar at *Basrah*, the respondent obtained £3,800 less for the sugar than the price obtainable when it should have been delivered.

The appellant contended that he was not liable for this sum as he had no special knowledge of the seasonal and other fluctuations of the sugar market. But the House of Lords held that a ship owner must be presumed to know that prices in a commodity market were liable to fluctuate, and judgment was given against him.

(III) Exceptional loss not covered:

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11 *Rodocanachi v. Milburn*, (1886) 18 Q.B.D. 67.
12 *Wilson v. Lancs. & Yorks. Ry.* (1861) 9 C.B.N.S. 632.
13 *Koufos* v. C. *Czarnikow Ltd.,* (1969) 1 A.C. 350.

On the other hand, the first branch of the rule in *Hadley* v. *Baxendale*[14] does not cover losses, which are the consequence of special facts not known to the party in default at the time the agreement was made. In *Hadley* v. *Baxendale* itself, the plaintiffs were unable to recover damages arising from the fact that they had only one shaft, and in Victoria Laundry[15] they were unable to recover in respect of the exceptionally lucrative Ministry of Supply contracts because information about those facts had not been conveyed to the defendants. Again in *British Columbia etc. Saw-Mill Co. Ltd.* v. *Nettleship*[16]

A number of cases of machinery intended for the erection of a sawmill at Vancouver were shipped on the defendant's vessel. The defendant failed to deliver one of the cases, but was unaware of the fact that it contained a material part without which the sawmill could not be erected at all. The plaintiff claimed the cost of replacing the lost parts, and the loss incurred by the stoppage of its works during the time that the rest of the machinery remained useless owing to the absence of the lost parts.

It was held that the measure of damages was the cost of replacing the lost machinery at Vancouver only, and the Court said:

"The defendant is a carrier, and not a manufacturer of goods supplied for a particular purpose ... He is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the

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14 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

15 *Victoria Laundry V. Newman,* (1949) 2 K.B. 528, C.A.

16 *British Columbia etc. Saw-Mill Co. Ltd.* v. *Nettleship,* (1868) L.R. 3 C.P. 499.

time of entering into the contract. It must be something which could have been foreseen and reasonably expected, and to which he assented *expressly* or *impliedly* by entering into the contract."

This principle will exclude the recovery of damages in respect of loss of profit on actual or contemplated forward contracts where the carrier has no actual or imputed knowledge of these at the time of the contract. The loss of profit on such sales is too remote. An illustration is provided by *Horne* v. *Midland Railway Company.*[17]

The plaintiff being under contract to deliver military shoes in London for the French army at an unusually high price by a particular day, delivered them to the defendant to be carried, with notice of the contract only as to the date of delivery. The shoes were delayed in carriage, and were consequently rejected by the intending purchasers. The plaintiff sought to recover, in addition to the ordinary loss for delay, the difference between the price at which the shoes were actually sold and the high price at which they would have been sold if they had been punctually delivered.

It was held that this damage was not recoverable unless it could be proved that the company was informed of the exceptional loss, which the plaintiff might suffer from an unpunctual delivery. Again, it has been held that a person who contracts to purchase land intending to resell it to an identified sub-purchaser at a profit will not be able to recover in respect of the loss of the sub-sale where the seller does not know of the purchaser's intention and purpose and the consequent exposure of the seller to the

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[17] *Horne* v. *Midland Railway Company,* (1873) L.R. 8 C.P. 131. *Heskell v. Continental Express* (1950) 1 All E.R. 1033.

risk of such damage in the event of breach.[18]

(IV) Immaterial that breach not contemplated:

It is, however, immaterial that the breach was of a type not reasonably to be anticipated, for the parties naturally contemplate performance and not breach. Thus, in *Banco de Portugal* v. *Waterlow & Sons Ltd.:*[19]

W & Co. agreed to print for the Bank of Portugal a quantity of Portuguese banknotes of a particular type. They negligently delivered to one M, the head of an international band of criminals, some 580,000 of these notes, and these were subsequently put into circulation in Portugal. Upon discovery of the fraud, the Bank issued notices withdrawing from circulation al1 notes of that type, and undertook to exchange them for other notes. The Bank then brought an action against W & Co. claiming as damages for breach of contract the value of the notes exchanged, and the cost of printing the genuine notes withdrawn.

It was held by a majority of the House of Lords that these losses were recoverable. The damage suffered, although the result of a breach which could scarcely be said to have been in the contemplation of the parties at the time they made the contract, was nevertheless to be considered as flowing from the business positions of the parties and arising naturally from the breach.

9.2.2 Damage in contemplation of the parties*:*

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18 *Seven Seas Properties v. Al Essa (No.2),* (1993) 3 All E.R. 577.

19 *Banco de Portugal* v. *Waterlow & Sons Ltd.* (1932) A.C. 452.

This deals with such damage as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

As we have seen, the application of this second branch of the rule depends upon the knowledge, which the contract-breaker possesses at the time of the contract, of special circumstances, outside the 'ordinary course of things', of such a kind that a breach in those circumstances will cause more loss. It is well illustrated by *Simpson* v. *London and North Western Railway Company:*[20]

The plaintiff, a manufacturer, was in the habit of sending specimens of his goods for exhibition to agricultural shows. After exhibiting in a show at Bedford, he entrusted some of his samples to an agent of the defendant company for carriage to a show-ground at Newcastle. On the consignment note he wrote: 'I\1ust be at Newcastle Monday certain'. Owing to a default on the part of the company, the samples arrived late for the Newcastle show. The plaintiff therefore claimed damages for his loss of profits at the show. It was held that the company was liable. The company's agent had knowledge of the special circumstances, that the goods were to be exhibited at the Newcastle show, and so should have contemplated that a delay in delivery might result in this loss.

It is usually said that 'bare knowledge' of the special circumstances surrounding the contract is sufficient to

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20 *Simpson* v. *London and North Western Railway Company,* (1876) 1 Q.B.D. 274.

make the contract-breaker liable.[21] But there is some authority for the view that, in addition, the contract-breaker should either expressly or impliedly has contracted to assume liability for the exceptional loss. On this view, the mere communication to a party of the existence of special circumstances is not enough: there must be something to show that the contract was made *on the terms* that the defendant was to be liable for that loss.[22]

This view cannot be supported. No doubt a casual intimation would not suffice, for the special circumstances must be disclosed in such a manner as to render it a fair inference of fact that both parties contemplated the exceptional loss as a probable result of the breach. Thus, in *Kemp* v. *Intasun Holidays Ltd.*:[23]

While booking a holiday Mrs K remarked to the travel agent that her husband was not present because he was suffering, as he sometimes did, from an asthma attack. In breach of contract Mr and Mrs K were accommodated for the first 30 hours of their holiday in a filthy and dusty room in an inferior hotel and Mr. K had an asthma attack throughout the period. The trial judge awarded Mr. K *inter alia* £800 for the consequences of having suffered an asthma attack due to the state of the alternative accommodation.

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21 *Patrick v. Russo- British Grain Export Co. Ltd.*, (1972) 2 K.B. 535.

22 *British Columbia etc. Saw-Mill Co. ltd. v. Nettleship* (1868) L.R. 3 C.P. 499,; *Horne v. Midland Ry.* (1873) L.R. 8 C.P. 131,; *Victoria Laundry (Windsor Ltd.) v. Newman Industries Ltd.* (1949) 2 K.B. 528,; *Seven Seas Properties v. Al Essa (No 2)*, (1993) 1 W.L.R. 1083, *Hadley v. Baxendale*, (1854) 9 Exch, 341.

23 *Kemp* v. *Intasun Holidays Ltd.,* (1987) 2 F.T. L.R. 234.

It was held by the Court of Appeal that this casual remark did not suffice to give the defendant the necessary degree of knowledge of special circumstances to make the defendant responsible for the consequences of the asthma attack he had suffered. What is necessary to enlarge the area of contemplation is that the special circumstances should be brought home to the party.[24] But it is unnecessary that it should be a term of the contract that the defendant is to be liable for that loss.[25]

9.3 KINDS OF DAMAGES:

After deciding the nature of damages, it becomes reasonably easy or affordable for the Juries, Courts or decision making authorities to award damage under the head of a particular type or kind of damage. The damages of following all the different types are recognized and awarded as well by the England and native Courts. More or less, the all types of damages are divided into the following four broad categories:

(e) General Damages.
(f) Special Damages.
(g) Nominal Damages.
(h) Exemplary Damages.

9.3.1 General Damages:

The term “General Damages” has been interpreted by the Indian Courts and the English Courts in various ways. The purpose of awarding general damages is measured by which the loss can be assessed except the opinion and the

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24 *Heywood v. Wellers* (1976) 1 Q.B. 446.
25 *Koufos v. C Czarnikov Ltd.,* (1969) 1 A.C. 350.

judgment of a reasonable man and which can be said to be based on assessment of the damages, which can be based on practical aspect.[26] The English Court Division Bench has in the year 1963 in the case of *Charter-house Credit v. Tolley*,[27] held that assessment of damages has never been an exact science. It is essentially practical. As early as 1880, the English Court in *Marzelti vs. Williams*[28] held that general damages are those damages which the law will presume in case of breach of contract which would arise out of direct, naturally, or probable consequences of Act which has been complained of.[29] All these judgements when analyzed would lead to the principle that general damages are distinct from special damages and general or nominal damages can be given if the plaintiff is unable to prove the exact quantum of loss, then he would be entitled to either nominal damage or he may be precluded from recovering general or ordinary damages. The law now is settled that general damages have to be awarded in respect of injury to the plaintiff out of the breach of contract. It may even include loss of future income pain and suffering. The term general damages also takes within it purview damages at large. This expression is based on law of practical compensation for the injury caused. If the plaintiff proves that the result of breach of the contract is such which has caused some wrong then the Court would award damages. It would be necessary to give proof of damages but normally this is given for wrongful act or under the breach or where a person maliciously induces other person to break their business, such damages have

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26 *Union of India v. M/s. Commercial Metal Corporation;* AIR 1982 Delhi 267.

27 *Charter-house Credit v. Tolley* (1963) 2 Q.B. 683, 711.

28 *Marzelti v. Williams,* (1880) 1 B & Ad. 415.

29 *Ashby v. White;* (1703) 2 Ld. Raym, 938; *Stroms Brucks Aktie v. Hutchinson,* (1905) A.C. 515.

been awarded or can be awarded. Thus in short, general damages are awardable for non-pecuniary loss and it includes several elements, which would include:

[A] Damages for mental and physical shock, pain, suffering, already suffered by the claimant or likely to suffer in future,

[B] Damages for the loss of expectation of life,[30] that is the normal longevity of the person concerned is a shortened on account of injury.

[C] Damages to compensate for the loss of amenities of life that may include a pattern (variety) of matters, that is, the claimant may not be able to walk, sit, run or loss of marriage prospects, disfigurement, Sexual inter course, and loss of other amenities in life on account of injury.

[D] Inconvenience, hardship, frustration, disappointment, discomfiture, mental stress in life, dejection and unhappiness in future life.

The Rule propounded in *Hadley v. Baxendale*[31] has been time and again reiterated by Indian and English courts to mean that general damages are awarded for those actions, which arise naturally in the usual course of things and breach committed thereof. The defendant is liable for all that natural happens in the course of such breach in course of the contract and after the breach of the contract.

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30 *Baldeo Krishnan v. Chander Deep Jain*, AIR 1984 P & H 9.
31 *Hadley v. Baxendale,* (1854) 9 Exch, 341.

General damages are such as the jury may give when the Judge cannot point out any measure by which they are to be assessed except the opinion and the judgment of a reasonable man.[32] They are, therefore, those damages, which the law will presume in the case of every breach of contract,[33] as the direct, natural or probable consequences of the act complained of.[34]

General damages may, consequently, include nominal damages and are quite distinct from special damages.[35] For, there is authority for the proposition that in cases of breach of contract. if the special damages claimed are not proved the plaintiff will be entitled to nominal damages. General damages are given for injury to reputation or the humiliation caused of necessity by the wrongful act.[36] As the Privy Council has observed in *Madan Mohan Dass v. Gokul Dass*.[37] "the principle applied to actions of breach of contract is, the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damages he has laid, unless the special damage is the gist of the action".

But, where special damage is the gist of the plaintiff's cause of action and he fails to prove such damage, he is precluded from recovering ordinary damages.[38]

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32 *Prehn v. Royan Bank of Liverpool*, (1870) 5 Exch. 92.

33 *Marzetti v. Williams*, (1880) 1 B. & Ad. 415; *Omkarlal v. Banwarilal*, AIR 1962 Raj. 127.

34 *Stroms Brucks Aktie v. Hutchinson*, (1905) A.C. 515.

35 *Columbus Co. v,. Clowes*, (1903) 1 K.B. 244; *Chaplin v. Hicks*, (1911) 2 K.B. 786.

36 *Suhbaraya v. Venkatarama Iyer*, 32 I.C. 592.

37 *Madan Mohan Dass v. Gokul Dass,* 10 M.I.A. 563; *Puran Deb v. Govinda Ram*, 15 C.P.L.R. 39; *Sardar Khan v. Munshi*, 1961 M.P.L.J. 165.

38 *Edward Wilson v. Kanhaya Sahoo*, 11 W.R. 143

9.3.2 Special Damages:

Special damages are such damages, which can be computed in terms of money. Halsbury calls, “Special damages which may be laid and proved in terms of figures; while on the other hand, general damages are defined as matters which cannot be stated in money or money worth and including such things has bodily or mentally suffered, loss of reputation and the like as pointed above. In regard to special damages, they have to be specifically pleaded and proved; whereas general damages do not need to be so specifically alleged and proved.

Special damages, on the other hand, are such, as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly.[39] As pointed out by Bowen. L.J. in *Ratdiffe v. Evans*[40]: The term “special damages" is not always used with reference to similar subject-matter nor in the same context. At times, in the law of contract, it is employed to denote that damage arising out of the special circumstances of the case, which, properly pleaded may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right. In all such cases the law presumes that some damages will follow in the ordinary course of things from the mere invasion of plaintiff’s rights and calls it general damage. Special damage in such a context means

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39 *Stroms Brucks Aktie v. Hutchinson,* (1905) A.C. 515.

40 *Ratdiffe v. Evans,* (1892) 2 Q.B. 524 : 61 L.J. Q.B. 535.

the particular damage. Beyond the general damage, which results from the particular circumstances of the case and of plaintiffs claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression 'special damage' when used of this damage denotes an actual and temporal loss which has, in fact, occurred. The term 'special damage' has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway to denote that actual and particular loss which plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action."

The special damages arise on account of circumstance which may be unusual and which affect the applicant or plaintiff. The law has developed by the English courts and the Indian courts basically emphasizes on the fact that the Special Circumstance was brought to the knowledge of the other contracting party and possibly all special loss was conveyed to the other contracting party. As early as 1868, English Court in *British Columbia Saw Mill Co. v. Nettleship*[41] observed that:

“The parts of a saw mill machinery, packed in cases, were given to the defendant, a carrier, for carriage to Vancouver. One of the cases was lost and consequently a complete mill could not be erected and operated. The plaintiff claimed the cost of lost machinery and the profits,

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41 *British Columbia Saw Mill Co. v. Nettleship*; (1868) L.R. 3 C.P. 499.

which could have been earned if the mill had been installed in time. The Court allowed only the cost in Vancouver of the articles lost. The loss of profits to be made from the intended use of the mill was held to be too remote."

However, subsequently, the said view in 1876 was qualified to mean that even if the other party to the contract was not made aware of the special circumstance but was in knowledge of the circumstance, he would be liable for such damages and the Court in England had held that the formal communication between two parties was not necessary. In the case of *Simpson v. London & North Western Railway Co.,*[42] it has been observed that:

"The plaintiff was in the habit of exhibiting samples of his implements at cattle shows. He delivered his samples to the defendant company for consignment of the show grounds at New Castle. The consignment note said: "must be at New Castle on Monday certain". But no mention was made of the intention to place the goods in the exhibition. On account of negligence the goods reached only after the show was over. But as the company was already aware of the object of carrying the goods there, the plaintiff was allowed to recover not only the loss of freight but also the profits he would have made by placing the goods at the show."

This view was again reiterated in the case of *B.P. Exploration & Co. v. Heent*,[43] that a fragmentize was purchased by the plaintiff under a hire-purchase agreement. Its rotor broke down before normal life. The

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42 *Simpson v. London & North Western Railway Co.* : (1876) 1 QBD 274.

43 *B.P. Exploration & Co. v. Heent;* (1982) 2 QBD 925.

plaintiff had no means to replace it at cash price. He had to arrange it again at a hire-purchase price and claimed the same as damages. The defendant contended that the plaintiff had to pay hire-purchase price because of his lack of means. This contention was rejected. The fact that in the present circumstance of economy business has to depend upon hire-purchase system was held to be within the contemplation of parties. In the case of *Jaques v. Millar*,[44] where the lessor knew the purpose for which the lessee required the premises, he was held liable for the loss of that purpose during the delayed period.

Therefore, it can be said that in London, the law is now qualified that where the party is in know how that the contract breacher was in knowledge of special circumstance, he would be liable. Thus foreseeability is the principle, which covers the theory propounded in *Hadley v. Baxendale*.[45] Thus the English Courts have now developed the law on the basis of reasonable foreseeableness.[46]

Under the Indian Law, damages can be claimed only where there is a valid contract and that contract has been breached.[47] It is held that where there was memorandum of understanding reached between the parties to decide to settle their dispute through compromise. However, if the memorandum of understanding was entered, the parties corresponded with each other, exchanging offers and counter offers. This correspondence showed that there was no consensus to the terms and conditions stipulated in the

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44 *Jaques v. Millar*; (1877) 6 Ch D 153.
45 *Hadley v. Baxendale,* (1854) 9 Exch, 341.
46 *Heron II, the Koufos v. C. Czarnikow Ltd.* (1969) 1 AC 350: (1967) 3 All E.R. 686, HL.
47 *Union Bank of India v. Ramdas Madhav Prasad*; (2004) 1 SCC 252.

memorandum of understanding and when there is no consensus, there cannot be any remedy.

To claim damages, the frustration of the contract must be based on fundamental or sweeping character, which would virtually make the contract unperformable, and not just contract, which would make the contract capable of being performed at a later stage.[48] It is rightly held that event should be of such a nature, which the parties could not with original diligence for forcee and must not be self induce.

The House of Lords, as early as 1932 in Portuguese-Bank note case in *Banco de Portugal v. Waterlow & Sons Ltd.*[49] have held that losses are recoverable when the damage occurred may be the result of a breach which can be said to have been contemplated by the parties at the time when they make contract. However, the parties were supposed to consider that the breach was from the business position of the parties and the damage was arising naturally from such a breach. This view can be said to be innovative in those days, which would appear from the facts of the case and the rule that special damages were to be granted even if the breach was not contemplated.

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48 *Gujarat Housing Board v. Vikul Corporation;* AIR 2004 Guj. 319.

49 *Banco de Portugal v. Waterlow & Sons Ltd.* (1932) A.C. 452.

➢ **Different Meanings of Special Damages:**

The observations made by Bowen. L.J .. in the above case have been followed by the Madras High Court in *Nanjappa Chettiar v. Ganapati Goundan*.[50] According to this passage, therefore, there are three different meanings in which the term "special damage" is used.

In the first place. it means the actual damages sustained may be proved beyond what are known as general damages. i.e. the particular damage which results in the particular circumstances of the case.[51] In this class of cases, special damages, if properly alleged and proved, can be recovered in addition to the general damages which flow from the wrongful act complained of, and such special damages are recoverable in action founded on breach of contract.[52]

In the second place, where it is the damage done that is the wrong or where it otherwise said that damage is the gist of the action and no positive right is violated, it means the actual and temporal loss that has in fact occurred. When used in this sense it is synonymous with "express loss" or "particular damage" or "damage in fact".

In the third place, the term "special damage" means the particular loss which the plaintiff has suffered beyond what is sustained by the general public and which is itself the

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50 *Nanjappa Chettiar v. Ganapati Goundan,* I.L.R. 35 Mad. 508 at 598 : 12 I.C. (M) 507; *Khurshid Hussain v. Secretary of State*, A.I.R. 1937 Pat. 302.

51 *Omkarlal v. Banwarilal,* A.I.R. 1962 Raj. 127.

52 *Frante v. Gaudet,* (1872) L.R. 6 Q.B. 199; *Ramalingam v. Gokuldas*, A.I.R. 1926 Mad. 1021.

cause of action, e.g. where the act complained of is a public nuisance.[53]

When used in this sense. "Special damage" is not confined to merely pecuniary loss but means and includes very great inconvenience,[54] and in some cases it was even held that narrowing a highway so as practically to block it amounts to special damages.[55]

- **General and Special Damages:**

The line may at times be difficult to draw between what is general damage and special damage. But the line, though it may be thin, is yet there and there can be two categories of damages, general and special, even in respect of a loss resulting directly from a defamatory allegation against a person engaged in a business.

It will by and large depend on the nature of one's business. If the person concerned is dealing with a particular category of customers who regularly approach him, then it may very well in a given case, fall under the category of a special damage. But if the transactions that the person would be undertaking are casual and the customers are such who do not regularly seek him, then in that given context the loss of business can be taken to be a general damage.[56]

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53 *Mohandas v. Gokuldas*, 12 I.C. 507.

54 *Khaji Sayyad Hussain v. Ediga Narasimhappa,* 16 I.C. 962: 23 M.L.J. 539.

55 *Ram Kishun v. Banwari Rai,* 25 I.C. 266.

56 *Bela Ram v. Sukh Sampat Lal,* AIR 1975 Raj. 40; *Pillamarri Lakshmikantham v. Ramakrishna Pictures, Vijayawada*, AIR 1981 A.P. 224.

➢ **Damages at large:**

The expression "damages at large" may be explained as meaning that the Judge can give whatever amount he thinks right as if he were the jury. If facts are sufficiently proved from which it may properly be inferred that some damage must have resulted to the plaintiff from the defendant's wrongful act, the jury may give any damages, and it is not necessary to give proof of specific damage. The damages are damages at large. Thus in actions for trespass,[57] or for maliciously inducing persons to break their business contracts,[58] or for infringement of a copyright,59 or for publishing a libel, whether on a person, a firm or a company,[60] the damages are said to be at large, and the Court may grant any amount which it considers fit, having regard to the conduct of the parties respectively, and all circumstances of the case.[61]

➢ **Special Damages have to be pleaded:**

It is true that the particulars of damages are not detailed in the plaint but at the same time it has to be remembered that what is claimed is only general damages. It is a well-recognized principle of law that when once the injuries mentioned in the plaint are proved to be the result of actionable negligence on the part of defendants. General damages have to be presumed by the Court. In the case of

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57 *Saha Lal v. Amba Prasad,* AIR 1922 All 526.

58 *Exchange Telegraph Co. v. Gregory & Co.* (1896) 1 Q.B. 147 : 65 L.J.Q.B. 262.

59 *Fenning Film Service Ltd. v. Wolverhampton Walsall and District Cinemas,* (1914) 3 K.B. 1171 : 83 L.J.Q.B.. 1860.

60 *South Helton Coal Co. v. North Eastern News Association,* (1894) 1 Q.B. 133: 63 L.J. Q.B. 293.

61 *Nadirshaw v. Pirojshaw*, 19 I.C. 98.

British Transport Commission v. Gourley,[62] Lord Goddard explaining the position has observed:

"In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earning incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage, which in, law implies and is not specially pleaded. This includes compensation for pain and suffering and the like and if the injuries suffered are such as to lead to continuing or permanent disability compensation, for loss of earning power in the future."

Thus it is clear that special damages claimed should be specified in the plaint and proved in the evidence whereas general damages have to be presumed by the Court. What is claimed in the present case is only general damages and hence the defect in the plaint would not come in the way of the Court awarding damages.[63]

9.3.3 Nominal Damages:

“Nominal damages is a technical phrase, which means that you have negatived anything like real damages. That there is an infraction of a legal right which though it gives you no right to any real damages at all, yet gives you a right to the verdict, or judgment because your legal right has

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62 *British Transport Commission v. Gourley,* (1956) A.C. 185.
63 *Adamkhan Mohammad v. Ramesh Raya Naik*, 1978 A.C.J. 409.

been infringed."[64] Nominal damages are intended only where the plaintiff has sustained *injuria sine damnum*, that is, where a right of his has been infringed but not so as to cause any sensible damage.[65] Nominal damages can, therefore be defined as a sum of money that may be spoken of but that has no existence in point of quantity; a mere peg on which to hang coats.[66] From this it must not be supposed that nominal damages necessarily mean small damages.[67] They form an intermediate class of damages between contemptuous and substantial damages, and in practice the amount varies from forty shillings in English money[68] to one shilling.[69] The Indian Courts have decreed to the plaintiff sums varying from Rs. 75 to Rs. 100. towards nominal damages.[70]

The case must be one in which the plaintiff has cause of action owing to infringement of civil right but in which no real damage has been caused to him[71] or where a breach of duty has been committed against him but has not in fact produced any actual damages[72] or where he fails to prove that he has suffered any substantial loss[73] he is only entitled to nominal damages.[74] Again, where the plaintiff has no intention of performing his part of the contract and the defendant committed only a

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64 "The Mediana", (1900) A.C. 113, per Lord Halsbury , cited in *Bishun Singh v. A.W.N. Wyatt*, 14 C.L.J. 515: 11 I.C. 729.

65 *Seetaramaswami v. Secretary of State of India*, AIR 1925 Mad. 682.

66 *Beaumont v. Greathead,* (1816) 2 C.B. 494.

67 *Bishun Singh v. A.W.N. Wyatt,* 14 C.L.J. 515 : 11 I.C. 729; *Akshoy Kumar v. Akman Molla*, 27 I.C. 397.

68 *Columbus Co. v. Clowes,* (1903) 1 K.B. 245.

69 *Sapwell v. Bass,* (1910) 2 K.B. 486.

70 *Bishun Singh v. A.W.N. Wyatt,* 14 C.L.J. 515.

71 *Kumud Kanta Chakraburthy v. E. Bignold , Manager Court of Wards,* AIR 1923 Cal. 306.

72 *Columbus Co. v. Clowes,* (1903) 1 K.B. 244.

73 *Marzetti v. Williams,* (1830) 1 B. & Ad. 415.

74 *Weld & Co. v. Harcharan*, 4 Lah. L.J. 317.

technical breach thereof, or where the plaintiff has sustained actual damages not through the wrongful act of the defendant,[75] but from his own (negligent) conduct,[76] the damages he is entitled to receive are merely nominal. In general, it may be said that where a cause of action is established, the plaintiff is entitled to some damages.[77] Even where the Court finds that the suit is vexatious and that no damages have really been sustained by the plaintiff there is nothing to prevent it from giving him nominal damages[78] though as a matter of right, he is not entitled to insist upon such damages being awarded to him.79 But he is, in law, at least entitled to a decree in declaration of his rights without costs and damages.[80]

The award of nominal damages for the infliction of a legal wrong may, very often, settle the question of title or determine rights of the greatest importance to the plaintiff, for as has been observed by Sergeant Williams in *Meller v. Spateman,*[81] whenever any act injures another's right and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of specific damages. It is important to observe, as Courts shall notice hereafter, that in India, owing to the provisions of Sec. 73 of the Indian Contract Act, the award of nominal damages for breach of contract is not

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75 *Sanders v. Stuart,* (1876) 2 C.P.D. 326.
76 *Warre v. Colvert,* (1837) 7 Ad. & Edn. 143.
77 *Parusnath Saha v. Brijo Lal,* 8 W.R. 44.
78 *Futeek Parooee v. Mohender Nath,* I.L.R. 1 Cal. 385 : 25 W.R. 226.
79 *A. Buchanan v. Avdali*, 15 B. L.R. 276 : W.R. Suppl. Vol. III. p. 283: *Nabakrishna v. Collector of Hooghly,* 2 B.L.R. 275 : W.R. Suppl. Vol. I p. 120.
80 *Kaliappa Gaundan v. Vayapuri Gaundan,* 2 M.H.C.R. 442.
81 *Meller v. Spateman,* (1651) 1 Saunders 346.

permissible. A plaintiff is entitled to "nominal damages" where his rights have been infringed, but he has not in fact sustained any actual damage from the infringement,[82] or he fails to prove that he has,[83] or although he has sustained actual damage, the damage arises not from the defendant's wrongful act,[84] but from the conduct of the plaintiff himself[85] or the plaintiff is not concerned to raise the question of actual loss,[86] but bring his action simply with the view of establishing his right.[87]

Nominal damages have been defined as a sum of money that may be spoken of but that has no existence in point of quantity, or a mere peg on which to hang coats.[88]

As far as nominal damages are concerned, it is awarded where the plaintiff has sustained damage but which is not of a major magnitude and it can be the damages where the breach is technically and the plaintiff had not performed his part of the contract. The Calcutta and

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82 *Taylor v. Hemiker,* (1849) 12 Ad. 488; *Clifton v. Hooper,* (1844) 6 Q.B. 468; *West v. Houthton,* (1879) 4 C.P.O. 197; *Northam v. Hurley,* (1853) 1 E. & B. 665; *Columbus Co. v. Clowes ,* (1903) 1 K.B. 244; *Ashdown v. Ingamells,* (1880) 5 Exd. 280.

83 *Twyman v. Knowles,* (1853) 13 C.B. 222; *Marzetti v. Williams,* (1830) 1 B. & Ad. 415; *Nicholls v. Ely Best Sugar Factory Ltd.* (1936) Ch. 343. C.A.; *Clomien Fuiel Econmiser Co. Ltd. v. National School of Salesmanship Ltd.,* 60 R.P.C. 209 (C.A.).

84 *Hiort v. London and North Western Rly. Co. ,* (1879) 4 Exc. 188 : *C.A. Saunders v. Stuart,* (1876) 1 C.P.D. 326.

85 *Warre v. Calvert,* (1837) 7 Ad. & El. 143; *Hamlin v. Great Northern Rly. Co.,* (1856) 1 H. & N. 408; *Weld Blundell v. Stephens,* (1920) A.C. 956 (H.L.)

86 1 Wms. Saund (1871) Edn. 626 at p. 627 (note) : *Marzetti v. Williams,* (1830) I. & Ad. 415.

87 *Northam v. Hurley,* (1833) 1 E. & B. 665; *Medway Co. v. Earl of Rommey,* (1861) 9 C.B. N.S. 575; *Emray v. Owen,* (1850) 6 Exch. 353; *Nicolls v. Elp. Beet Sugar Factory Ltd.* (1936) Ch. 343 (C.A.).

88 *Beaumont v. Gresthead,* (1846) 2 C.B. 494; *Halsbury's Law of England*, 4th Edn., Vol. 12, p. 417.

Lahor High Courts have concurrent on this term. In *Arjandas vs. Secretary*[89] the English courts have held that where the plaintiff had not suffered actual or fails to prove any damage, is entitled to nominal damage.[90] Bombay High Court way back in 1958 held that the plaintiff can be awarded nominal damage when the damage has been caused where it was caused by the conduct of the plaintiff itself rather than that of defendant. These normal damages are normally awarded where the plaintiff wants to establish his right or get his right recognized but this is always at the discretion of the Court. However, Indian Court have held that in India Normal damages can also be granted if damage is actual occurred. The Court of Appeal way back in 1957 in the case of *Charter v. Sullivan*[91] has held that the party can recover its loss; even if he sales the property to some other person. However, there is a distinction in another case[92] on account of the customer's breach in lifting the car in terms of his agreement, the dealer had to return the car to the manufacturer. He was allowed to recover the profits which he would have made on sale of the car to the defaulting customer.

It has been pointed out by the Delhi High Court, following some earlier High Court decisions that Section 73 does not give any cause of action unless and until the damage is actually suffered. The case before the Court was *Union of India vs. Tribhvandas Lalji Patel*.[93]

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89 *Arjandas v. Secretary;* AIR 25 Cal 737.

90 *Halsbury's Laws of England,* 2nd Edn., Vol. 10, Para-105.

91 *Charter v. Sullivan*; (1957) I All ER 809 : (1857) 2 Q.B. 117.

92 *W.L. Thompson Ltd. v. Robinson (Gunmakyrs) Ltd.*, (1955) 1 ALL ER 809.

93 *Union of India vs. Tribhvandas Lalji Patel,* AIR 1971 Delhi 120.

A contract for the supply of sleepers to the Railway administration contained a number of clauses including this that irrespective of whether the government suffered any loss or not on account of the contractor's failure to supply the Government was entitled to damages. The contractor failed to supply, but the railways did not suffer any loss. Even so an action for damages was instituted against the Contractor. The Court did not award any damages and further observed, "If the contrary view was to be taken, the provisions of S. 73 will become nugatory and a party would be penalized, though the other party has suffered no loss. But, where the plaintiff suffers no loss the Court may still award him nominal damages in recognition of his right. But this is in the discretion of the Court.

In *State of Karnataka vs. Rameshwars Rice Mills, Thirthahalli,*[94] there was the following provision in the agreement:" ... for any breach of conditions set forth herein-before, the first party (contractor) shall be liable to pay damages to the second party (State Govt.) as may be assessed by the second party".[95]

Dismissing the appeal, the Supreme Court held that the assessment power was "subsidiary and consequential", and could be exercised only when the first party admitted breach. The second party could not adjudicate upon the question of breach as law does not allow it to be an arbiter in his own case."

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94 *State of Karnataka vs. Rameshwars Rice Mills, Thirthahalli,* AIR 1987 SC 138.; *Devendra Singh v. State*, AIR 1987 All 306; *State of U.P. v. Tipper Chand,* AIR 1980 SC 1522.

95 AIR 1987 SC 1257.

The Court, however, examined the question whether one of the parties could assess or quantify damages but did not express any opinion whether that party had unbridled power to apply any measure of damages or follow the rule of the thumb. The measure of damages cannot be made bonfire at he altar of a party's whim in derogation of the settled principles of assessment of damages envisaged in Sections 73 and 74 of Indian Contract Act, 1872.[96]

There is a difference between the power to sell the goods and power to enter into contract to sell the goods at the future date. This aspect has been very clearly interpreted by the Bombay High Court in *Satyanarayan A. Bhatt vs. Vithal N. Jandar*.[97] This fact has been interpreted to mean that a person who has power to sell ready goods cannot be considered to have power to enter into the contract of sell of all future goods. Section 74 of the Contract Act would apply where the parties have pre-estimated their damages in case there is breach. If, however, this amount has been mentioned in *terrorem*, it will be by way of penalty and the plaintiff will not to be entitled to claim this amount of any reasonable amount unless it has shown that he is actually sustained damages.

It is a settled legal position as far as India is concerned that where the dispute arises between the buyer and seller, buyer would be entitled to claim damages if he proves that goods supplied to him were of inferior quality than the one for which the parties had negotiated. In *The Board of Trustees for the Port of Calcutta vs. Dhanrajmal*

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96 Annual Survey of the Law; 1987; Vol. 23.

97 *Satyanarayan A. Bhatt v. Vithal N. Jandar*; 1957 BLR 1071.

Gobindram[98] a Division Bench of the Calcutta High Court set aside the trial Court's decree for damages for Rs. 15,000 in favour of the plaintiff when there was no material on record, he not having produced any evidence before the Court to substantiate his claim for damages, and remanded the case to that Court for consideration of the quantum of damages after giving the parties opportunity of adducing further evidence on that point. The goods (cotton) had been imported by him from the U.S.A. part of the goods were lost when they were in the possession of the port authorities for fumigation. The Court held them liable for the loss of the goods as they had failed to take the degree of care required of them as bailees under the law. The plaintiff, however, had failed to let in any evidence by producing his accounts to show the price he had paid for the goods. The trial Court had relied on the oral evidence of the manager of the plaintiff firm that the price of the goods lost was Rs. 15,000. The observed that 'in the absence of any special circumstance the measure of damages cannot be the amount of the loss ultimately sustained by the (plaintiff), it can only be the difference of the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided of course that there was a fair market then."[99]

9.3.4 Exemplary Damage:

The primary object of an award of damages is to compensate the plaintiff for the harm done to him; a possible secondary object is to punish the defendant for

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98 *The Board of Trustees for the Port of Calcutta vs. Dhanrajmal Gobindram,* AIR 1978 Cal. 369.

99 Annual Survey of the Indian Law. 1978, Vol. 14.

his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages or even retributory damages,[100] and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment. Whether a modern legal system should recognise exemplary damages at all has been much debated, but it is thought that, all in all, the case for dispensing with them is made out. The central argument against them is that they are anomalous in the civil sphere, confusing the civil and criminal functions of the law;[101] in particular, it is anomalous that money exacted from a defendant by way of punishment should come as a windfall to a plaintiff rather than go to the state. On the other side, a major justification of exemplary damages is that their existence provides a suitable means for the punishment of minor criminal acts which are in practice ignored by police too caught up in the pursuit of serious crime.[102]

In the 1760's exemplary damages first made their appearance on the English legal scene. The earliest cases arose in the *cause celebre* of John Wilkes and the *North Briton.* In the government's effort to stop the *North Briton* from being published, a variety of individuals suffered interference at the hands of public officials, and that too in actions of 1763 based upon such interference, *Huckle v. Money*[103] and *Wilkes v. Wood,*[104] awards of exemplary

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100 *Bell v. Midland Ry* (2861) 10 C.B. (N.S.) 287. *Broome v. Cassell & Co.* (1972) A.C. 1027, *Rookes v. Barnard* (1964) A.C.1129.

101 *Broome v. Cassell & Co.* (1972) A.C. 1027.

102 Street, (1962), *Principles of the Law of Damages,* pp.34-36.

103 *Huckle v. Money,* (1763) 2 Wils. K.B. 205.

104 *Wilkes v. Wood,* (1763) Lofft .

damages were made. By the end of the decade further awards had appeared in other contexts,[105] and thereafter exemplary damages became a familiar feature of contract law. In the 1960s the situation totally changed. In *Rookes v. Barnard*[106] the House of Lords took the opportunity to review the whole doctrine and held that, except in a few exceptional cases, which are dealt with later, it is no longer permissible to award exemplary damages against a defendant, however outrageous his conduct. That their Lordships recognised the exemplary principle as out of place in the law of damages is clear from the fact that they stated that their task was to consider, in the absence of any decision of the House approving an award of exemplary damages, whether it was open to them "to remove an anomaly from the law of England". There was, however, an attempt by the Court of Appeal in *Broome v. Cassell & Co.*[107] to question the decision, but on the appeal in that case their Lordships put paid to any such questionings. The House was, in the words of the Lord Chancellor:

"not prepared to follow the Court of Appeal in its criticisms of *Rookes v. Barnard,*[108] which ... imposed valuable limits on the doctrine of exemplary damages as they had hitherto been understood in English law and clarified important questions which had previously been undiscussed or left confused." "We cannot", he added, "depart from *Rookes v. Barnard* here. It was decided neither *per incuriam* nor *ultra vires* this House."

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105 *Benson v. Frederick* (1766) 3 Burr. 1845 (assault); *Tullidge v. Wade* (1769) 3 Wils. K.B. 18 (seduction).

106 *Rookes v. Barnard,* (1964) A.C. 1129.

107 *Broome v. Cassell & Co. Ltd.,* (1972) A.C. 1027.

108 *Rookes v. Barnard,* (1964) A.C. 1129.

The result is that two centuries of authorities have become suspect. Yet, the new thinking does not have such a drastic effect upon the existing case law as would at first sight appear. For as Lord Devlin, who spoke for all their Lordships on the issue of exemplary damages, pointed out in *Rookes v. Barnard,* there is a double rationale behind such awards. "When one examines the cases in which large damages have been awarded for conduct of this sort", he said, "it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed". The House considered that practically all the so-called exemplary damages cases could, and should, be explained as cases of aggravated damage-that is, as cases of extra compensation to the plaintiff for the injury to his feelings and dignity[109] and indeed it was the availability of this alternative explanation of the cases which allowed the House to place a general ban upon exemplary damages while remaining within the framework of precedent. Lord Devlin hoped that the decision of the House would:

"Remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject. Otherwise, it will not, I think, make much difference to the substance of the law or rob the law of the strength, which it ought to have. Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes."[110]

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109 *Ley v. Hamilton* (1935) 153 L.T. 384.

110 *Rookes v. Barnard,* (1964) A.C. 1129 at 1230.

Accordingly, the House did not find it necessary to overrule the earlier authorities. Indeed, only one case, *Loudon v. Ryder,*[111] was expressly overruled; the great majority fall now to be explained as awards on account of aggravated damage.[112]

Lord Devlin expressed the view in *Rookes v. Barnard*[113] that exemplary damages were a peculiarity of English law. It is more exact to regard them as a peculiarity of the common law, not accepted by other legal systems. For the English lead of the 1760s was in fact taken up both throughout the Commonwealth and in the United States of America, while the English *volte face* of the 1960s has not been largely followed by other jurisdictions within the common law family. Indeed, in Australia a clear rejection emerged when, in a libel action, the High Court refused to adopt the new English approach.[114] This refusal, moreover, was upheld on appeal by the Judicial Committee of the Privy Council,[115] basing its decision on two factors: that Australia, unlike England before *Rookes,* had already fully accepted the exemplary principle, with all its implications, where damages for libel were concerned; and that it was a matter for Australia, in an area of domestic rather than international significance where the need for uniformity within the Commonwealth is less, to decide whether to change her settled judicial policy on this issue in the law of libel. However, in *Broome v. Cassell & Co.*[116] Lord

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111 *Loudon v. Ryder,* (1953) 2 Q.B. 202, C.A.

112 *Owen and Smith v. Reo Motors* (1934) 151 L.T. 274, C.A.; *Williams v. Settle* (1960) 1 W.L.R. 1072, C.A.

113 *Rookes v. Barnard,* (1964) A.C. 1129 at 1221.

114 *Uren v. John Fairfax & Sons Pty,* (1967) Argus L.R. 25 : (1966) 40 A.L.J.R. 124; *Australian Consolidated Press v. Uren*, (1967) Argus L.R. 54; (1966) 40 A.L.J.R. 142.

115 *Australian Consolidated Press v. Uren*, (1969) 1 A.C. 590, P.C.

116 *Broome v. Cassell & Co.,* (1972) A.C. 1027.

Hailsham L.C. said that he viewed with dismay the doctrine that the common law should differ in different parts of the Commonwealth, and expressed the hope that, in the light of their Lordships' observations on *Rookes,* Commonwealth courts might modify their criticism of it.

The anomaly of exemplary damages having thus been largely removed, now for little short of half a century, from English law-such damages have no place in Scots law-by the efforts of two most distinguished courts,[117] it is somewhat disturbing to find moves on foot to bring them back. In its Consultation Paper on *Aggravated, Exemplary and Restitutionary Damages* the Law Commission has stated that it does not believe that the only function of the civil law is to compensate and has proposed provisionally, subject to the views of a wide range of consultees, that exemplary damages be re-introduced but be put upon what it calls a principled basis. A textbook on damages is not the place to address this full and admirable consultation paper but it is the place to assert a clear view that the true and only field of damages is compensation for loss and a consequent, and strongly held, belief that the re-introduction of exemplary damages would be a retrograde step, with its inevitable and twin results of allowing the civil law to enter the very different domain of the criminal law and of providing windfalls for plaintiffs which are in truth unmerited.

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117 *Rookes v. Barnard* (1964) A.C.1129.; *Broome v. Cassell & Co. Ltd.,* (1972) A.C. 1027.

➢ **Cases in which exemplary damages may be awarded**:

While laying down that, as a general rule, exemplary damages should no longer be awarded, Lord Devlin in *Rookes* considered that their Lordships

"Could not, without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle and there remain three categories of cases in which awards of exemplary damages continue to be legitimate, though not mandatory as whether to make an award is in the court's discretion.[118] Lord Devlin in Rookes found two categories of case which he described as categories in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal."[119]

Though two categories are established as part of the common law; Lord Devlin had necessarily to add the category of exemplary damages expressly authorised by statute. However, before turning to the three categories to which exemplary damages have been restricted since 1964, an additional restriction of a general nature on the availability of an award of exemplary damages should be addressed. This restriction only appeared in 1993 with the decision of the Court of Appeal in *A.B. v. South West Water Services.*[120]

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118 *Holden v. Chief Constable of Lancashire*, (1987) Q.B. a 380.
119 *Rookes v. Barnard,* (1964) A.C. 1129.
120 *A.B. v. South West Water Services,* (1993) Q.B. 507, C.A.

(1) The need for pre-Rookes acceptance of exemplary awards:

The restriction which requires the *pre-Rookes* acceptance of exemplary awards was not firmly established, indeed dormant, until *A.B. v. South West Water Services* where it was held, following the views of Lord Hailsham and Lord Diplock in *Broome v. Cassell*[121] that Lord Devlin in Rookes had not intended to add to or expand the anomaly of exemplary damages. In his judgment, said Stuart-Smith LJ. in *A.B. v. South West Water Services,* "this is not a developing field of the law". Awards might therefore only be made where the plaintiff's cause of action was one in respect of which awards of this kind had already been made before *Rookes* was decided.

(2) The three categories in which exemplary awards are possible:

(a) First common law category: oppressive, arbitrary or unconstitutional conduct by government servants.

The first of the two common law categories comprises cases in which, in Lord Devlin's words in *Rookes,* there has been "oppressive, arbitrary or unconstitutional action by the servants of the government".[122] This category is based primarily on the eighteenth-century cases, which introduced the general doctrine of exemplary damages. While the general justification advanced by the House in *Rookes* for retaining such cases within the exemplary damages net is that here:

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121 *Broome v. Cassell,* (1972) A.C. 1027, at 1076B and 1131A respectively.

122 *Rookes v. Barnard,* (1964) A.C. 1129.

"An award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. More important is the particular justification which is put by way of a contrast between public servants on the one hand and private corporations and individuals on the other. With the latter where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service."[123]

Accordingly, the facts of *Rookes* itself, which concerned trade unions and trade disputes, fell outside this category. It may be a matter for speculation how far the House, in selecting this category, was really impressed by the difference in the context of damages between the public and private sectors and how far it was motivated by the need to retain some scope for exemplary damages in order not to appear to be acting too cavalierly with the doctrine of precedent; in such a search, what better authorities to leave standing than those in which exemplary damages had originated? In *Broome v. Cassell & Co.* (1972) A.C. 1027.[124]

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123 *Rookes v. Barnard,* (1964) A.C. 1129 at 1226.
124 *Broome v. Cassell & Co.* (1972) A.C. 1027.

Lord Diplock doubted whether today it was still necessary to retain this category. From the aforesaid analysis and comparison of many cases of English and Indian Courts, that will fall within it, hardly being full of cases of actions arising out of oppressive conduct of public servants, which had attracted exemplary damages awards. It was said that it was probably true to say that the first three cases of the opening salvo in the campaign for exemplary damages[125] are the only decisions of the past two centuries, which survive. after *Rookes,* by virtue of falling within this category, while *Holden v. Chief Constable of Lancashire,*[126] coming nearly a quarter of a century after *Rookes* and involving a wrongful arrest by a police officer, was a so far isolated latter day illustration.[127] While it has been said that the retention of Lord Devlin's first category has allowed exemplary damages to continue to play an important role in the protection of civil liberties it is nevertheless suggested that the position has not basically altered from the position as it was stated in the last edition, for reasons, which will appear.

Three conditions must be satisfied before a first category case can be established. The first concerns the conduct of the defendant. This has to be shown to be, in Lord Devlin's words, oppressive, arbitrary or unconstitutional and, while it was said in *Holden v. Chief Constable of Lancashire*[128] that unconstitutional action would suffice without the need for additional oppressive or arbitrary behaviour, so that in

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125 *Huckle v. Money,* (1763) 2 Wils. K.B. 205; *Wilkes v. Woods,* (1763) Lofft 1; *Benson v. Frederick* (1766) 3 Burr. 1845.

126 *Holden v. Chief Constable of Lancashire,* (1987) Q.B. 380, C.A.

127 *Att.-Gen. of St Chiristopher, Nevis and Auguilla v. Reynolds*, (1980) A.C. 637, P.C.

128 *Holden v. Chief Constable of Lancashire,* (1987) Q.B. 380, C.A.

effect the three epithets fall to be read disjunctively, it is thought that unconstitutional action will not suffice without the presence of aggravating features; the central requirement for exemplary damages has always been, as already said, the presence of outrageous conduct, disclosing malice, fraud, insolence, cruelty and the like, and the anomaly of exemplary damages is not to be widened now. Thus Sir Thomas Bingham M.R. in *A.B. v. South West Water Services*[129] described the public nuisance there negligently committed as being "quite unlike the abuses of power which Lord Devlin had in mind".

The second condition to open the door to a first category award concerns the status of the defendant. Lord Devlin in *Rookes* spoke of servants of the government but in *Broome* their Lordships were agreed that that term was to be widely interpreted so as to include not only Crown servants but also the police and local and other officials.[130] This wide approach has caused it to be suggested in *Columbia Picture Industries v. Robinson*[131] that solicitors executing an Anton Piller order as officers of the court, and in *R. v. Reading J.J., ex. p. South West Meat*[132] that officers of the Agricultural Produce Intervention Board, are included. Even where the defendant is clearly within the definition of government servant it must be established that the act complained of has been done in the exercise of a governmental function. In *Bradford City Council v. Arora*[133] the selection of an employee by a local authority, improperly made by reason of sexual and racial

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129 *A.B. v. South West Water Services,* (1993) Q.B. 507, C.A.
130 *Broome v. Cassell & Co.* (1972) A.C. 1027.
131 *Columbia Picture Industries v. Robinson,* (1987) Ch. 38.
132 *R. v. Reading J.J., ex. p. South West Meat,* (1992) Crim. L.R. 672.
133 *Bradford City Council v. Arora,* (1991) 2 Q.B. 507, C.A.

discrimination, was held to constitute the exercise of a governmental function and the argument that the authority was acting in a private capacity was rejected. Nevertheless Neill L.J. was of the view that there might be cases where the carrying out of a duty by a junior officer of such an authority might not be the exercise of a public function and indeed in *Holden v. Chief Constable of Lancashire*[134] the court similarly was not prepared to accept that every act of a police officer without authority brought the category into play. And in *A.B. v. South West Water Service*[135] the defendant, a nationalised body set up under statute for the commercial purpose of supplying water to the public, was held by the Court of Appeal not to be within the first category because in its commercial activities it was not acting as an instrument or agent of government. Moreover, with today's trend towards privatisation such bodies are likely to cease even being government servants; indeed the defendant in *A.B.,* though a public body at the time of the incidents complained of, had since been privatised.

(b) Second common law category: conduct calculated to result in profit:

The second of the two common law categories comprises cases in which, again in Lord Devlin's words in *Rookes,* "the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff".[136] As with the first common law category, the general justification advanced was that here exemplary damages could serve a useful purpose in vindicating the law's strength, but, once again,

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134 *Holden v. Chief Constable of Lancashire,* (1987) Q.B. 380, C.A.

135 *A.B. v. South West Water Service,* (1993) Q.B. 507, C.A.

136 *Rookes v. Barnard,* (1964) A.C. 1129 at 1230.

it is the particular justification, which is the more important. Lord Devlin in his classic words has said:

"Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object perhaps some property which he covets-which he either could not obtain at all or not obtain except at a price greater than he wants to put down."

(c) Express authorisation by statute:

In the past, it has been known for statutes expressly to empower the courts to award exemplary damages in respect of particular wrongs where this is justified by the conduct of the defendant. However, the early statutes so providing, which are the Distress for Rent Acts of 1689 and 1737 and the Landlord and Tenant Act of 1730, did not refer to exemplary damages as such but enacted that the plaintiff should be entitled to double damages or in one case to treble damages. Clearly, the House of Lords in *Rookes* had no option but to accept these dictates of statute, and therefore no question of rationalising the incidence of exemplary damages in this category arose. Nevertheless, statutory provisions of this nature before *Rookes* were extremely few, and beyond these early statutes there existed only two, the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 and the Copyright Act 1956, both of which, as will be seen, were equivocal on the issue. Understandably, now that

exemplary damages have been generally prohibited, none has appeared-or at least none has clearly appeared-since. Lord Devlin's only illustration in *Rookes v. Barnard*[137] was indeed the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, a statute of a somewhat esoteric nature, which gave by Part I protection to servicemen against remedies involving interference with goods, such as execution, distress and the like, and provided by section 13(2) that in any action for damages for conversion in respect of such goods the court may take into account the defendant's conduct and award exemplary damages. In *Broome* Lord Kilbrandon interpreted "exemplary" in section 13(2) as meaning "aggravated", basing this interpretation upon the fact that the subsection applies, by section 13(6), to Scotland where exemplary damages are not recognised.[138] Indeed he expressed himself as "not convinced that any statutory example of the recognition of the doctrine is to be found", and appears to have taken the view that with the confusion of terminology before *Rookes,* all references to exemplary damages in *pre-Rookes* statutes should be treated as referring to aggravated damages, putting forward the ingenious suggestion that, to make sense of the provision in the survival of actions legislation of 1934 prohibiting "exemplary" damages in actions by, but not against, the estate, "exemplary" must be read as "aggravated".

Certainly, where there is a statute which makes no express reference to exemplary damages but is so phrased as to permit an authorisation to award exemplary damages to be inferred, such an inference is now not likely to be drawn. This situation arises with the Copyright, Designs and

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137 *Rookes v. Barnard,* (1964) A.C. 1129.
138 *Broome v. Cassell & Co.* (1972) A.C. 1027.

Patents Act 1988, which by section 97(2) gives the court power, in assessing damages for an infringement of copyright, to award such "additional damages" as the court may consider appropriate in the light of the flagrancy of the infringement and any benefit accruing to the defendant by reason of it; a provision in similar terms is introduced for actions for infringement of design right by section 229(3). The predecessor of section 97(2), section 17(3) of the Copyright Act 1956 which essentially said the same, had been held in *Williams v. Settle*[139] to permit an award of exemplary damages, but Lord Devlin reserved his opinion in *Rookes v. Barnard*[140] as to whether the Act "authorises an award of exemplary, as distinct from aggravated, damages". Yet the answer to this question would appear to be implicit in Lord Devlin's own speech: since he was careful to phrase this category in terms of exemplary damages which are expressly authorised by statute, the provision of the Copyright, Designs and Patents Act 1988 must fall outside its ambit. In *Broome,* while Lord Kilbrandon expressed himself as satisfied that the section in its 1956 version did not authorise exemplary damages,[141] Lord Hailsham L.c. said that even if it did-and he considered the point an open *one-Williams v. Settle*[142] should be regarded as a case falling within the second common law category as the defendant's motive was profit.[143]

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139 *Williams v. Settle,* (1960) 1 W.L.R. 1072, C.A.
140 *Rookes v. Barnard,* (1964) A.C. 1129.
141 *Broome v. Cassell & Co.* (1972) A.C. 1027.
142 *Williams v. Settle,* (1960) 1 W.L.R. 1072, C.A.
143 *Broome v. Cassell & Co.* (1972) A.C. 1027.

(3) The amount of the exemplary award:

(I) Various criteria applied by the courts:

In so far as the object of exemplary damages is to punish, the calculation of the amount to be awarded must clearly be based on criteria different from those employed in the calculation of compensatory damages. Over the years various criteria have been advanced, and some accepted, as relevant to the calculation; now, in particular, in *Rookes v. Barnard*[144] Lord Devlin, speaking for all their Lordships, has stated three considerations[145], which should always be borne in mind when awards of exemplary damages are in issue.

(a) The plaintiff to be the victim of the punishable behaviour:

Lord Devlin's first ruling was that a plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. It is difficult, however, to see that there is any real scope for the operation of such a rule, a rule indeed that had not appeared before in the cases. Since it is generally accepted law that causes of action cannot be assigned by act of parties, the only important situation in which the victim is not the plaintiff is where he has died and suit is being brought by his estate. But this situation has already been provided for by statute; the Law Reform (Miscellaneous Provisions) Act 1934, in providing for the survival of wrongful act, expressly stated that damages in an action for the benefit of the estate should not include

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144 *Rookes v. Barnard,* (1964) A.C. 1129.
145 *Broome v. Cassell & Co. Ltd.,* (1972) A.C. 1027.

any exemplary damages. Perhaps Lord Devlin should be taken as intending only to endorse the statutory rule; yet it may be doubted whether the statutory rule is itself a particularly sound one.

(b) Moderation in awards:

Next, on a more general note, Lord Devlin considered that awards of exemplary damages should be moderate. Some of the awards that juries have made in the past seemed to him. And in *Broome v. Cassell* & *Co.*[146] Lord Hailsham L.C. said that, while himself unable to follow Lord Devlin:

"So far as regards the right of appellate courts to interfere with jury awards on principles different from the traditional nor, I think, with the proposal that *Benhom v. Gambbing*[147] offers a precedent for arbitrary limits imposed by the judiciary in defamation cases. I regard it as extremely important that, for the future, judges should make sure in their direction to juries that the jury is fully aware of the danger of an excessive award."

It is true that in *Broome* the House of Lords was upholding an exemplary award of £25,000, now worth nearly £200,000, but various features of this decision need to be remembered: that the decision was one of a bare majority, three out of a full House of seven being prepared to upset the award as excessive; that the majority was swayed by the great reluctance of the courts to interfere with the damages award of a jury and that Lord Diplock's "doubt if

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146 *Broome v. Cassell* & *Co.,* (1972) A.C. 1027.
147 *Benhom v. Gambbing, (1941) A.C.J. 157 (H.L.)*

any of your Lordships would have hesitated to interfere with it if it had been awarded by a judge sitting alone"[148] was amply justified from what was said in the speeches; that Lord Morris regarded the "case as exceptional in the sense that the jury must have considered that the conduct of the defendants merited very special condemnation". In *John v. MGN*[149] the Court of Appeal awarded £75,000 by way of exemplary damages in a libel case, a figure which may not appear to be so very moderate, but there were other factors to be taken into consideration such as the wealth of the defendant, a criterion dealt with below; furthermore, the award was in substitution for the far higher one made by the jury of £275,000. Certainly moderation is much more in evidence in the cases of trespass and nuisance brought by evicted tenants than in the libel cases. *Drane v. Evangelou*[150] and *Guppy (Bridport) v. Brookling and James,*[151] also dealt with below, produced awards of £1,000 and later cases have ranged from £1,000 to £3,000; many such awards too have been of aggravated and exemplary damages combined.

(c) The means of the parties:

The third consideration propounded by Lord Devlin was the means of the parties. Clearly, a small exemplary award would go unnoticed by a rich defendant while even a moderate award might cripple a poor defendant, so that for the size of the defendant's bank balance to influence the size of the award is fully appropriate. This has probably always been the implicit practice of the

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148 *Broome v. Cassell* & *Co.,* (1972) A.C. 1027 at 1122 E.
149 *John v. MGN,* (1996) 2 All E.R. 35, C.A.
150 *Drane v. Evangelou,* (1978) 1 W.L.R. 455, C.A.
151 *Guppy (Bridport) v. Brookling and James,* (1983) 1 H.L.R. 1, C.A.

courts; indeed it was explicitly recognised right at the start of exemplary damages in *Benson v. Frederick,*[152] and today in *John v. MGN* it was said that it was not there disputed that the defendant's great wealth was a relevant consideration. On the other hand, it is difficult to see how the means of the plaintiff can have any real relevance to the amount to be awarded on an exemplary basis.

(d) The conduct of the parties:

The parties' conduct has also been taken into account in the past and, though unmentioned by Lord Devlin, would appear to remain today a relevant consideration in assessing exemplary damages. Thus the court may take into account, according to the decision in *Praed v. Graham,*[153] the conduct of the defendant right down to the time of judgment, and also, according to the view expressed in *Greenlands v. Wilmshurst,*[154] the conduct of the defendant's counsel at the trial. An apology by the defendant in the witness box would make a difference in his favour, according to Singleton L.J. in *Loudon v. Ryder,*[155] while persistence in the charge might increase exemplary damages.[156] Similarly, the conduct of the plaintiff may be material to the assessment. Thus if the plaintiff has provoked an assault by the defendant, and assuming circumstances which would today admit of an exemplary award, then, as was said in *Lane v.*

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152 *Benson v. Frederick,* (1766) 3 Burr. 1845.
153 *Praed v. Graham,* (1890) 24 Q.B.D. 53, C.A. (libel).
154 *Greenlands v. Wilmshurst,* (1913) 3 K.B. 507, at 532 (libel).
155 *Loudon v. Ryder,* (1953) 2 Q.B. 202, C.A. at 207 (assault).
156 *Warwick v. Faulkes* (1844) 12 M. & W. 507; *Walter v. Alltools* (1944) 61 T.L.R. 39, C.A.

Holloway,[157] the provocation would be "relevant to the question of whether or not exemplary damages should be awarded, and, if so, how much".[158]

(e) The relevance of the amount awarded as compensation

While the assessment of compensation can never be affected by the amount awarded by way of exemplary damages, the converse is not true. The size of an exemplary award may indeed be influenced by the size of the compensatory one. Thus Lord Devlin in *Rookes v. Barnard*[159] indicated that, in a case where exemplary damages were appropriate:

"a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."

There is no reason why the same principle should not apply to awards made by judges sitting alone. This principle was fully endorsed by all seven of their Lordships in *Broome v. Cassell & CO.*[160] and its operation is well illustrated by *Drane v. Evangeloll*[161] where a landlord resorted to trespass by forcible entry in order to evict his

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157 *Lane v. Holloway,* (1968) 1 Q.B. 379, C.A., at 391.

158 *O'Connor v. Hewitson (*1979) Crim.L.R. 46. C.A.; *McMillan v. SinKh* (1914) 17 H.L.R. 120. CA.; *Greenlands v. Wilmshurst (1913)* 3 K.B. 507, *C.A ..* at 532; *Tolley v. Fry (*1930) 1 K.B. 467. CA. at 476.

159 *Rookes v. Barnard,* (1964) A.C. 1129 at 1228.

160 *Broome v. Cassell & CO.,* (1972) A.C.1027.

161 *Drane v. Evangeloll,* (1978) 1 W.L.R. 455, C.A.

protected tenant and the Court of Appeal upheld the county court judge's decision that such monstrous behaviour called for exemplary damages of £1,000. While Lord Denning M.R. was content to view the award simply as one of exemplary damages and endorse it as such, Lawton and Goff L.JJ. thought that it could be justified as an amalgam of aggravated damages and exemplary damages. Both indeed considered that the award was not excessive as one for aggravated damages only, but said that, even assuming in the landlord's favour that it was excessive as such, they had, in Goff L.J.'s words, "not the slightest doubt that the aggregate included an element of punishment which was not in the circumstances excessive"

And in *Guppy (Bridport) v. Brookling and James,*[162] where a similar action by tenants against their landlord succeeded in nuisance rather than trespass, an award of £1,000 which combined exemplary and compensatory elements was again upheld by the court of appeal. In *John v. MGN*[163] Lord Devlin's "if, but only if" test, as it was there called, was explicitly applied; the result of its application was still to require an exemplary award. In so far as the object of exemplary damages is to deter from wrongful conduct, the realisation of this object will generally require that a potential wrong doer should know that he may have to pay exemplary damages even if he has not caused any significant loss to the plaintiff; if, on the other hand, his Course of action will clearly cause the plaintiff substantial damage for which he will be required to pay, that in itself should prove a sufficient deterrent.

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162 *Guppy (Bridport) v. Brookling and James,* (1983) 14 H.L.R. 1, C.A.

163 *John v. MGN,* (1996) 2 All E.R. 35, C.A.

(f) The irrelevance of the judge's criticism in his judgment:

It was at one time suggested that the fact that the judge, where he is sitting alone, has severely criticised the defendant in his judgment should be taken into consideration to reduce the exemplary award. In *Rook v. Fairrie*[164] the principle had been laid down by the Court of Appeal that, whereas a jury cannot mark their sense of the grossness of a libel in any other way than by awarding heavy damages, a judge may take into account, as a ground for awarding less than a jury would probably allow, that he has been able to express his views in his judgment. This principle, capable of application, has after a cold reception[165] by the Court of Law eventually been disapproved by the House of Lords in *Dingle v. Associated Newspapers,*[166] which was again an action for libel. While this disapproval was *obiter,* as it did not appear that the judge at first instance had awarded smaller damages because he had expressed his views in his judgment, it was a very firm one and was expressed by all their Lordships. Lord Morton, with whose remarks the rest of their Lordships agreed, and also Lord Denning, pointed out that the judge could not know what effect his vindication would have, as he could neither ensure that the newspapers would give it adequate publicity nor know how far the plaintiff's general reputation would be improved by his complimentary remarks. These arguments do indeed suggest that their Lordships were examining the rule in its relation to compensatory damages for aggravated injury,[167]

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164 *Rook v. Fairrie,* (1941) 1 K.B. 507, C.A.

165 *Knuppfer v. London Express Newspaper* (1943) K.B. 80. CA., at 91.; *Bull v. Vazquez* [1947] I All E.R. 334, CA .. at 336-337.

166 *Dingle v. Associated Newspapers,* (1964) A.C. 371.

167 *Rookes v. Barnard,* (1964) A.C.1129.

but the disapproval of the *Rook v. Fairrie*[168] principle appears to be a wise one even in the context of exemplary damages proper, since it is doubtful how far a defendant meriting punishment will be affected by adverse comments of one of Her Majesty's judges as opposed to the extraction of money from his pocket.

(g) The position with joint wrongdoers:

Where joint wrongdoers are sued together, the conduct of one defendant does not allow exemplary damages to be awarded in the single judgment which must be entered against all if the conduct of the other defendant or defendants does not merit punishment. This was the view of Pollock B. in *Clark v. Newsam,*[169] and is now finally established by the House of Lords in *Broome v. Cassell & CO.*[170] However, in so far as an award of aggravated damages is being made, then the aggregate award should take into account both the aggravation engendered by the one defendant and the absence of aggravation on the part of the other or others. This was the view of Alderson B., also in *Clark v. Newsam,*[171] and was adopted by Slesser L.J. in *Chapman v. Ellesmere.*[172] The practical application of these basically complementary rules should be easier now that a clear demarcation between exemplary damages and aggravated damages has been established, but it must be said that in *Broome v. Cassell & CO.*[173] Lord Wilberforce and Lord Diplock indicated in obiter dicta, apparently not concurred in by Lord Reid, that they would apply the rule

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168 *Rook v. Fairrie,* (1941) 1 K.B. 507, C.A.
169 *Clark v. Newsam,* (1847) 1 Ex. 131 at 141.
170 *Broome v. Cassell & CO.,* (1972) A.C. 1027.
171 *Clark v. Newsam,* (1847) 1 Ex. 131 at 141.
172 *Chapman v. Ellesmere,.* (1932) 2 K.B. 431, C.A.; at 471-472.
173 *Broome v. Cassell & CO.* (1972) A.C. 1027.

that the House was unanimously establishing for exemplary damages to aggravated damages as well.

(II) The irrelevance of the criteria to the second common law category:

Yet while the application of these criteria to the assessment of the award no doubt makes sense where the aim of the court is in truth the punishment of the defendant, they have little or no relevance where the so-called exemplary damages are designed to operate as an indirect method for extracting profits wrongfully obtained by the defendant.[174] This proposition may be tested against any of the criteria dealt with above, but it will suffice to examine it in relation to a few of them and it is probably best to take the three considerations which Lord Devlin required to be borne in mind when awarding exemplary damages. Thus, if a defendant's unjust enrichment is to be prevented, awards should not be moderate or indeed immoderate, but should be geared to the profit obtained or obtainable by the defendant; similarly, awards should be influenced not by the overall means of the defendant but by the amount that he stands to gain from his conduct. Moreover, difficult enough as it is to see why a defendant should only be punished where the plaintiff is the victim of the punishable behaviour, it is even more difficult to be persuaded that he should lose his profit only if he is sued by the person upon whom he has inflicted the wrong. If exemplary damages are now largely to be used as an indirect means of preventing the unjust enrichment of a wrongdoer, it is certainly time to remove, or at least qualify, the statutory prohibition of exemplary damages in actions brought by the estate of a deceased victim. For it

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174 *Malo v. Adams* [1970] 1 O.B. 548, C.A,

must not be forgotten, when evaluating the various criteria for assessment which have developed over the years and which, either in general or in particular, have been re-stated by Lord Devlin, that it is this second common law category relating to conduct bringing profit in its train which seems destined to dominate the exemplary damages scene in the future; the first common law category is thought now to have a comparatively small compass and the statutory category certainly an insignificant one.

In certain circumstances, the court may award more than the normal measure of damages, by taking into account the defendant's motives or conduct. Such damages may be:[175]

(i) 'aggravated damages', which are compensatory in that they compensate the victim of a wrong for mental distress, or injury to feelings, in circumstances in which that injury has been caused or increased by the manner in which the defendant committed the wrong, or the defendant's conduct subsequent to the wrong; or

(ii) 'Exemplary damages' are intended to make an example of the defendant; they are punitive and not intended to compensate the plaintiff for any loss, bur rather to punish the defendant.

While aggravated damages are of compensatory nature, exemplary damages are punitive in nature.

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175 *Halsbury's Law of England,* 'Damages', Fourth Edn., reissue, Vol. 12, para 811.

The English Law Commission has recommended[176] for enacting a legislation providing that aggravated damages may be awarded only to compensate a person for his or her mental distress rather than to punish the defendant for his or her conduct, and that, wherever possible, the term 'damages for mental distress' should be used instead of 'aggravated damages'. It also recommended that 'exemplary' or 'punitive' damages being damages awarded if in committing the wrong, or later, deliberately and outrageously disregarded the plaintiff's rights, but that such damages should not be awarded for breach of contract.

Exemplary damages are those awarded against the defendant as a punishment, and hence the assessment exceeds compensation to the plaintiff. These are awarded not to compensate the claimant, nor even to strip the defendant of his profit, but to express the court's disapproval of the defendant's conduct, e.g., where he has deliberately committed a wrong with a view to profit.[177] Exemplary damages could be awarded in cases of breach of promise to marry,[178] until this cause of action was abolished there in the year 1970. Punitive damages are not available under the English law in an action for breach of contract.[179] In *Addis v Gramophone Co Ltd*,[180] it was held that exemplary damages could not be awarded for wrongful dismissal, and no compensation was payable on the ground that the plaintiff's feelings were injured due to the

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176 The *Report of the (English) Law Commission* (Law Com no 247 of 1997) on 'Aggravated, Exemplary and Restitutionary Damages.'

177 Treitel, Tenth Edn., *The Law of Contract,* p. 872.

178 *Quirk v. Thomas*, (1916) 1 KB 516.

179 *Perera v Vtmdiyar* [1953] 1 All ER 1109 : [1953] 1 WLR 672 (CA); *Reed v Madon [1989]* Ch 408 : [1989] 2 All ER 431;

180 *Addis v Gramophone Co Ltd,* (1909) AC 488.

humiliating manner in which he was dismissed.[181] The Canadian view is that punitive damages may be awarded, albeit rarely, in contract cases.[182]

The rules in law of contract for remoteness of damages are quite narrow in compare to rules for remoteness of damages. In *Addis v Gramophone Co. Ltd,*[183] the House of Lords held that aggravated damages cannot be awarded in an action for breach of contract. It has, however, been held that where elements of fraud, oppression, malice or the like are found, the court may grant vindictive or exemplary damages by way of punishment to the wrongdoer.[184]

This kind of damages is sometime called vindictive or punitive damages. They are intended not merely to award adequate compensation to the injured party but also to punish the wrongdoer. In other words, they are intended to be in *solatium* to the plaintiff and in *terrorem* to the public. The interest of society and of the aggrieved party is blended together and the damages are given not only to recompense the sufferer but also to punish the offender. They are damages given for "example's sake" and they are clearly punitive or exemplary in nature. In such an action there are three distinct heads of damages, namely (I) pecuniary loss. (2) Compensation for wounded feelings and injured pride, and (3) a sum of money of penal nature in addition to the compensating damage given for either

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181 *Malik v Bank of Credit and Commerce Intl*, (1998) AC 20 : (1997) 3 All ER 1 (HL).

182 *Vorvis v. Insurance Corpn of British Columbia,* (1989) 1 SCR 1085.

183 *Addis v Gramophone Co. Ltd,* [1909] AC 488 : [1908-10] All ER Rep I; *Bliss v SE Thames Regional Health Authority* [1987] ICR 700; *Alexander v Home Office* [1988] 2 All ER 118.

184 *Sheikh Jaru Bepari v AG Peters,* AIR 1942 Cal 493.

pecuniary or physical or mental suffering.[185] It is not sufficient, however, merely to show that the defendant has committed a wrongful act, but his conduct must be high-handed, insolent or malicious.[186]

Where in a case the reckless conclusions of the defendant may amount to malice in law but no private malice or personal grudge has been proved and the defendants acted throughout in the public interests, it was held that it was not a case for exemplary damages.[187]

It is to be noted that in action for breach of contract with the exemption of the breach of promise of marriage[188] vindictive damages are not granted, inasmuch as the motives of the defaulting party never enter into the consideration of the quantum of damages. "Damages for breach of contract are in the nature of compensation, not punishment":[189]

Exemplary damages not favoured under Indian law. The rule of vindictive damages has not, however, found much favour with the Indian High Courts and they have repeatedly refused to follow the English practice of granting vindictive damages. Turner, C.J., in *Parvati* v. *Manner*[190] observed: 'We are unwilling to give our adhesion to the principle of vindictive damages. The object of civil litigation should be the remedying of civil injuries. "

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185 *Butterworth v. Butterworth of Eaglefield*, I.L.R. (1920) Pat. 126.
186 *Livingstone v. Ranyards Coal Co.,* (1880) 5 A.C. 25.
187 *L.A. Subramania Iyer v. R.H. Hitchock,* A.I.R. 1925 Mad. 950.
188 *Berry v. De Costa,* (1856) 1 A. & N. 408.
189 *Addis v. Gramophone Co. Ltd.,* (1909) A.C. 488.
190 *Parvati* v. *Manner,* I.L.R. 8 Mad. 175 at p.181.

In the recent case Sadasiva Iyer. J. has said: "I shall content myself with observing that the whole doctrine of penal and exemplary damages is due to the illegitimate encroachment of the considerations of punishment by fine in criminal jurisprudence into the realms of civil litigation and I wholly deprecate the introduction of such complications of the English system into India".[191]

Even in cases of breach of promise of marriage vindictive damages were refused on the ground that the conditions in India are entirely different from those obtaining in England.[192] In the same Court, such damages were refused to a very respectable lady who was wrongfully detained by the railway authorities.[193] In short, in assessing damages caused by a wrongful act the injury sustained should alone be considered and not the punishment to be inflicted.[194] And even in England. it has been stated that where exemplary damages have to be granted there must be some reasonable proportion between the wrong done and the damages awarded.[195]

However, the Calcutta and Allahabad High Courts would seem to favour the grant of vindictive or exemplary damages in cases where the conduct of the defendant was not that of an honest man and was

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191 *Naganatha Sastri v. Subramanya Iyer,* 32 M.L.J. 392 at p. 398 : 5 L.W. 598.

192 *Abdul Rasak v. Mohammud Hussain,* 38 I.C. 771.

193 *Kasturbai v. G.I.P. Rly. Co.,* A.I.R. 1923 Bom. 172 at p. 172.

194 *Bulbaddar Singh v. Solamo*, 5 W.R. 107.

195 *Greenlands Ltd. v. Willmshurst and London Association,* (1933) 3 K.B. 507 at p. 532.

actuated by no improper motive or malice. Thus where the defendant was found guilty of persistence in a proved nuisance exemplary damages were granted by the Calcutta High Court.[196]

Again in the case of willful continuance of trespass by a defendant who took a risk and persisted in fighting when he knew or ought to know that he was wrong the Allahabad High Court granted damages partly in *terrorem* to the other persons who might be disposed to act as the defendant had done.[197] And the same Court expressed the opinion that, where a person's name was omitted from the electoral roll of a certain constituency and he was thereby deprived of the right to vote. The same Court held that exemplary damages may be awarded, if the defendant acted maliciously.[198]

But the Madras High Court[199] in similar circumstances granted only nominal damages Rs.50. The Nagpur High Court has, however, expressed the opinion that the rule of exemplary damages is not limited to actions in trespass, and applied the rule in an action against a railway company for compensation for injury caused to a consignment of goods made over to them as a result of the continuous negligence of their servants.[200]

In all these cases, however, owing to the existence of aggravating circumstances, substantial damages were granted to the plaintiffs as a *solatium* to the injury they suffered.

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196 *J.C. Galstaun v. Dunia Lal Seal*, 9 C.W. N. 612.
197 *Sohan Lal v. Amba Prasad,* A.I.R. 1922 All. 526 at p. 526.
198 *Municipal Board, Agra v. Asharfi Ali,* A.I.R. 1992 All. 1 at pp.3,4.
199 *Draviyam Pillai v. Cruz Fernandez,* 31 I.C. 322.
200 *Sitaram v. G.I.P. Ry. Co.,* A.I.R. 1947 Nag. 224 at pp.227, 228.

This kind of award serves a double purpose, according to the majority view of American Courts, viz. punishment of defendant and, at the same time compensation to the plaintiff for intangible harm not otherwise compensable, thus compensating him more fully. Subject, however, to the requirement of a reasonable relation between compensatory and exemplary damages.[201]

No vindictive damages against Secretary of State.-It must, however, be noted that. in any view, no vindictive damages can be awarded against the Secretary of State because damages recovered from the Secretary of State are in truth, recovered from the tax-payer who has done no wrong to the plaintiffs.[202] At any rate it seems expedient that, in proper cases, the officer, for whose wrongful acts the Secretary of State is sought to be made liable, should also be sued so as to leave it to the discretion of the Government to determine how far the damages should be borne by the defaulting officer and how far, if at all, borne by the public.

Where the Court finds that the conduct of the public officer is high-handed, insolent or mischievous, and that the wrong suffered by the plaintiff is traceable to the willful and insolent conduct of the officer, there is no reason to refuse substantial if not vindictive damages to the plaintiff.

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201 (1947) 61 *Harvard Law Review*, pp. 119, 120.

202 *Beramji v. Secretary of State for India,* 1887 P. J. 205.

9.4 OTHER TYPES OF DAMAGES:

9.4.1 Moral Damages:

These damages are such as can be awarded to a person who has a special dignity by virtue of an office, religious or secular, which he is entitled to maintain against any person who intentionally insults or in any way lowers the dignity of such office. Moral damages are always difficult to estimate in money value, and the position of the plaintiff as respected member of the public, and the holder of an office, has to be taken into consideration.[203]

In addition to the three kinds of damages, nominal, general or ordinary, and special or particular damages, there are certain other terms employed in order to indicate the degree of damages, which may be awarded.

9.4.2 Contemptuous Damages:

The term "contemptuous damages" by its very nature, indicates that the Court is inclined to treat the plaintiffs claim with contempt, and that he is not entitled to anything more than a formal verdict followed by a trifling amount towards damages claimed.[204] The jury, or those who have to discharge the functions of jury, are entitled to examine the whole conduct of the plaintiff both before and during the action, and if they

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203 *Chenna Basappa v. Sree Sankara Bharatiswami,* AIR 1929 Mad. 493 at p. 495.

204 *Nadirshaw v. Pirojshaw*, 19 I.C. 98 (per Beaman, J.).

find that it was the plaintiff who provoked the wrongful act of the defendant, or that he is not entitled to the same respect and consideration as a thoroughly honest and innocent man deserves, or that his attitude is highly dissatisfactory,[205] they are not bound to give him anything more than what are known as contemptuous damages. The usual amount granted in such cases in English money is one farthing, but in Indian currency one *rupee* or sometimes even one *pie* is granted towards such damages.[206] But though the plaintiff may obtain a verdict in his favour he very often stands in danger of being deprived of his costs.[207]

9.4.3 Substantial Damages:

Substantial damages are those damages, which a plaintiff, with a good cause of action, is entitled to receive as a fair and adequate compensation for the damage he has suffered from the wrongful act of the defendant. No extraneous factors are taken into consideration in the assessment of such damages and the principle of *'restitutio in integrum'* is more faithfully adhered to. The Courts will endeavour to get at that sum of money, which will put the party, who has suffered, in the same position in which he would have been, if he had not sustained the wrong for which he seeks to recover compensation.[208]

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205 *Kelly v. Sherlock*, (1866) 7 B. & S. 480.

206 *Naridshaw v. Pirojshaw*, 19 I.C. 98 (per Beaman, J.).

207 *O'Conner v. Star Newspaper Co. Ltd.,* (1893) 69 L.T. 146.

208 *Livingstone v. Ranyards Coal Co.,* (1880) 5 App. Cas. 25; "The Columbus", (1849) 3 W. Rob. 158.

Courts in India more frequently adopt the principle of granting substantial damages even in cases of aggravated wrongs, and in case of failure to prove damage that can be measured in money, award[209] nominal damages. Besides where a person has suffered injury in respect of his social position and estimation, substantial damages will be awarded notwithstanding that he may not have sustained a pecuniary loss or physical injury by the act complained of.[210]

There are many authorities which established that substantial damages can be claimed where a breach is proved even though the calculation of damages is "not only difficulty but incapable of being carried out with certainty or precision". In all these cases, however, the extent of breach was established. There was complete failure on side to perform contract.[211] However, where the breach is partial and the extent of failure is unascertained, only nominal damages are awarded. The plaintiff who cannot show that he occupies a worse financial position after breach than he would have had, the contract been performed, can ordinarily recover only nominal damages for breach of contract.[212]

Where a defendant refuses to accept goods sold to or manufactured for him, and the plaintiff sells it to a third

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209 *Keshob Lal Nag v. Jhanendra Nath,* 24 I.C. 538.

210 *Bhyron Prasad v. Ishare,* 3 N.W. 313; *Kasturibai v. G.I.P. Rly. Co.,* AIR 1923 Bom. 172 at p. 172; *Nadirshaw v. Pirojshaw,* 19 I.C. 98.

211 *Luna Park (NSW) Ltd. v. Tramuways Advertising Proprietary Ltd.,* (1938) 61 CLR 286, p. 301; *Chaplin v. Hicks*, [1911] 2 KB 786, p. 791; *Marbe v. George Edwards (Daly's Theatre) Ltd.,* [1928] 1 KB 269 : [1927] All ER Rep 253; *Herert Clayton and Jack Waller Ltd. v. Oliver*, [1930] AC 209 : [1930] All ER Rep. 414; *Withers v. General Theatre Corpn.,* [1933] 2 KB 536 : [1933] ER Rep 385.

212 Halsbury's Laws of England, `*Damages'*, Fourth Edn., reissue, Vol. 12, para 980.

party on the same terms as were agreed to by the defendant and makes a similar profit, the plaintiff is entitled to nominal damages if the demand exceeds the supply of similar goods; but if supply exceeds the demand, the plaintiff will be entitled to recover his loss of profit on the defendant's contract.[213]

9.4.4 Prospective Damages:

The term "prospective damages" is used in cases where damages are granted to a plaintiff in respect of probable future loss or loss which he may 1 reasonably be expected to suffer from the wrongful act of the defendant. In such cases, damages, which the plaintiff has already suffered, and damages, which he might suffer in future, will be once for all assessed in a single action. The cause of action is single and indivisible and in the very nature of things, therefore prospective damages cannot be awarded in a case where a continuing cause of action subsists.

In the assessment of prospective damages, that is, of loss which is expected to happen in the future, there must necessarily be some degree of vagueness and want of precision, and a finding of future or prospective damages will not be bad in law merely because it cannot be justified by the evidence with perfect legal accuracy.[214]

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213 *Charter v. Sullivan,* [1957] 2 QB 117 : [1957] 1 All ER 809 : [1957] 2 WLR 528; *W.L. Thompson Ltd. v. R. Robinson (Gum Makers) Ltd.,* [1995] Ch 177 : [1955] 1 All Er 154 : [1955] 2 WLR 185.

214 *Koomaree Dasee v. Bama Sundari Dasee,* 10 W.R. 202.

9.4.5 Consequential Damages:

The term "consequential damages" denote those damages which follow as a consequence of a wrongful act producing loss of an indirect nature and which, however, are so proximate as to be recoverable.

The term "consequential damages" has acquired a special significance in this branch of law. Whenever damage follows a wrongful act, it may, in a broad sense, be said to be a consequence of the wrong and damages, therefore, be claimed by the injured party. But the law does not authorize the award of compensation in respect of all damages that flows out of a wrongful act. There can, properly speaking, be no limits to the damage caused by a wrong. Law has, therefore, set certain limits to the recovery of damages. The damages that are sufficiently proximate to the cause of action so as to be the natural consequence of the wrongful act, though of an indirect nature, are called consequential damages and are held recoverable in law.[215] This is almost the pivot upon which the entire Law of Damages hinges and Courts shall have occasion to discuss it.

9.4.6 Statutory Damages:

In Halsbury's Laws of England, statutory damages are described as meaning either the remedy in damages provided by some particular statute, under which the

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[215] *Hadley v. Baxendale,* (1854) 9 Exch. 341; *"The Argentino",* (1888) 13 P.D. 191.

action is brought, or such damages as are awarded for the direct infringement of the provisions of a statute or for neglect of a statutory duty.[216]

For Example the remedies provided by the Fatal Accidents Act, the Workman' Compensation Act, etc. fall under the former head, while the damages that can be recovered from Railway Companies and other statutory bodies for infringement of duties laid upon them by virtue of the provisions of particular statue fall under the second head.

9.4.7 Irreparable Damages:

Damages, which are impossible to measure, will be deemed irreparable damages.[217] Such damages can only be estimated by conjecture and not by any accurate standard.

At one point of time, it was believed that there was a general rule that one could not recover the damages for certain losses in action for breach of contract which turns into non-pecuniary losses. But over a period of time, court comes to a conclusion that there are certain losses, which are irreparable in nature on one, or other count and those losses can certainly be claimed as damages under the head irreparable damages.

A plaintiff who books a holiday with a tour operator may recover for loss of enjoyment if the holiday is spoilt by

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216 *Halsbury's Laws of England*, Vol. X, pp. 306 and 307.

217 *London and North-Western Rly. Co. v. Lancashire and Yorkshire Rly. Co.,* (1876) L.R. 4 Exch. 174.

a breach of contract.[218] The same principle was applied to an employee who suffered distress through the employer's breach of contract[219] (but this was later said to be wrong),[220]or to a client who suffers distress arising out of her solicitor's incompetent handling of an injunction designed to prevent molestation.[221] In these cases distress was precisely by the result to be expected from breach of the contract. It seems that damages cannot be recovered for distress arising from breach of an ordinary commercial contract.[222]

A separate but perhaps overlapping principle was thought to have been laid down by the House of Lords in *Addis v. Gramophone Co. Ltd.*[223] In this case the plaintiff was wrongfully dismissed from an important post in India in humiliating circumstances, which could hardly have failed adversely to affect his future employment prospects. It was held that his damages were limited to the wages that would have been earned during the period of notice that should have been given. Lord Loreburn had laid down a rule that a wrongfully dismissed servant could not recover damages for the manner of his dismissal, for his injured feelings or for the loss that he may suffer because it is more difficult for him to obtain fresh employment. Of these, the manner of dismissal and injured feelings may be

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218 *Jarvis v. Swans Tours Ltd.* [1973] QB 233 : [1973] 1 All E.R. 71; *Jackson v. Horixon Holidays Ltd.,* [1975] 3 All ER 92 : [1975] 1 WLR 1468, *Baltic Shipping Co. v. Dillon,* [1993] 176 CLR 344.

219 *Cox v. Philips Industries Ltd.,* [1976] 3 All ER 161 : [1976] ICR 138.

220 *Bliss v. South East Thames Regional Health Authority,* [1987] ICR 700.

221 *Heywood v. Wellers,* [1976] QB 446 : [1976] 1 All ER 300.

222 *Jayes v. James and Charles Dodd (a firm)*, [1990] 2 All ER 815, [1988] BTLC 380; *Watts v. Morrow,* [1991] 4 All ER 937 : Rose 55 Can Bar Rev 333; Jackson 26 ICLQ 502; MacDonad 7 JCL 134.

223 *Addis v. Gramophone Co. Ltd.,* [1909] AC 488.

regarded as non-pecuniary loss but the effect on future employment prospects is clearly financial.

Addis v. Gramophone[224] has attracted criticism since it was decided. In the last few years it has been considered in two important House of Lords decisions. In *Malik v. Bank of Credit and Commerce International*,[225]the facts of which have already been set out, the House of Lords held that, in principle, a plaintiff could recover damages for the loss of reputation and for the financial loss which flowed from it so called `stigma damages'.

Malik was not a case of wrongful dismissal but of breach of the implied term of trust and confidence but he matter came before the House of Lords again in a dismissal context in *Johnson v. Unisys Ltd*.[226] In this case the claimant had successfully alleged unfair dismissal before an industrial tribunal on the ground that his employer had not given him a fair opportunity to defend himself and had not followed its own disciplinary procedure. He had been awarded then statutory maximum. He then began an action for breach of the implied term of trust and confidence, claiming that his future employment prospects had been irretrievably damaged.

The House of Lords held that the claim failed. The majority view was that though employment law had been the subject matter of major developments through

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224 *Addis v. Gramophone Co. Ltd.,* [1909] AC 488.
225 *Malik v. Bank of Credit and Commerce Internation,* [1997] 3 All ER 1.
226 *Johnson v. Unisys Ltd.,* [2001] 2 All ER 801.

implied terms, it would not be appropriate to have a further common law development in the field of dismissal where Parliament had introduced a statutory system of unfair dismissal which was not based on contract. Lord Steyn concurred in this result because he thought that on the particular facts the claimant would have insuperable remoteness difficulties but in all other respects his analysis was very different and he considered that in principle on such facts an employee had a reasonable cause of action based on the implied obligation of trust and confidence. His Lordship took the view that if the head note of Addis's case correctly stated the ratio decidendi the time had arrived to depart from it and indeed that the House of Lords had done so in Malik's case.

9.4.8 Vindictive or Punitive Damages:

The term "vindictive damages" is used as synonymous with exemplary, or punitive damages. "The right to give punitive damages in certain cases is so firmly embedded in our law that only Parliament can remove it. The first category of cases in which punitive damages may be embedded is oppressive, arbitrary or unconstitutional action by the servants of the Government. I should not extend this category. I say this with particular reference to the facts of this case, to oppressive action by private corporations or individuals. It is not correct to say that it included only servants of the Government in the strict sense of the word.

It would obviously apply to the police and almost as certainly to local and other officials exercising improperly right of search or arrest without warrant, and it may be that in the future it will be held to include other abuses of power without warrant by persons purporting to exercise legal authority. What it will not include is the simple bully, not because the bully ought not to be punished in damages, for he manifestly ought, but because an adequate award of compensatory damages, by way of *solatium* will necessarily have punished him".[227]

9.4.9 "Pecuniary" and "non-pecuniary" Damages:

"Pecuniary damage" or "pecuniary loss" refers to any financial disadvantage, past or future, whether precisely calculable or not. Thus, past loss of earnings and an assessment of loss of future earnings, loss due to damage to a chattel, loss on breach of a contract for the sale of goods, and loss of profits constitute pecuniary damage.[228]

"Non-pecuniary damage" is exemplified by personal injuries, damage to reputation and interference with the employment of property, of course, although, of course, in each case pecuniary damage may have been sustained as well.[229]

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227 *Cassell & Co. Ltd. v. Broome,* (1972) 1 All E.R. 801 at pp. 829, 830, 838.

228 *Halsbury's Laws of England,* 4th Edn., Vol.12, p. 414.

229 *Cf. British Transport Commission v. Gourley,* (1956) A.C. 185 at p.206: (1985) 3 All. E.R. 796 at p.804 (H.L.) per Lord Goddard.

9.4.10 Non-pecuniary Special Damages:

In *R.D. Hattangadi v. Pest Control (India) Put. Ltd.*[230] the Hon'ble Supreme Court has laid down as under:-

"Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those, which the victim has actually incurred and which is payable or being calculated in terms of money; whereas non-pecuniary damages are those, which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain, suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life".[231]

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230 *R.D. Hattangadi v. Pest Control (India) Put. Ltd.,* 1995 (1) T.A.C. 557 (S.C.).

231 *Surendra Singh v. Chiraguddin,* 1998(2) T.A.C. 84 at p. 85 (Raj.).

9.4.11 Liquidated damages and unliquidated damages:

The old common law distinction between liquidated damages and penalty has been done away with by virtue of the provisions of Sec. 74 of the Indian Contract Act, IX of 1872, as amended by Sec. 4 of Act VI of 1899. The term "liquidated damages" is applied to such damages as constitute a liquidated demand payable in money. If a sum of money is previously agreed upon between the parties to a contract, to be paid, to either party, in case of breach of such contract whether or not actual damages is proved to have been caused thereby, it is called liquidated or stipulated damages which the party complaining of the breach is entitled to recover.[232]

On the other hand, the term "unliquidated damages", as opposed to liquidated damages, is applied to those damages which are not pre-determined or pre-arranged by the parties, but left to the discretion of the Court to be determined by the rules governing the measure of damages. It is immaterial even if a particular amount is specified in the pleading as the sum at which the plaintiff estimates the damages. Damages are said to be liquidated when they have been agreed and fixed by the parties. It is the sum, which the parties have agreed by contract as payable on default of one of them. Section 74 applies to these damages. In all other cases, the court quantifies or assesses the damages or loss; such damages are unliquidated. It is possible that the parties fix an amount as liquidated damages for a specific type of breach only; then the party suffering

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[232] Arnold, 2nd Edn., p.4., *Law of Damages.*

from other type breach may sue for the unliquidated damages arising from such breach.[233]

Where, under the terms of the contract, it was stipulated that if the goods were not supplied before the date fixed, the purchaser had a right to claim damages at the rate agreed and if they were not delivered within seven days of the date fixed, then the purchaser was entitled to cancel the contract and encash the bank guarantee, but the goods were delivered within the extended time, it was held that the purchaser was entitled to claim damages only at the rate agreed, and the clause relating to confiscation of bank guarantee could not be invoked since the contract was not cancelled.[234]

So far as the law in India is concerned there is no qualitative difference in the nature of liquidated and unliquidated damages, as s 74 eliminates the somewhat elaborate refinement made under the Common Law between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty, which under the Common Law is stipulation in terrorem; and a genuine pre-estimate of damages is regarded as liquidated damages, and is binding.

A claim for liquidated damages stands on the same footing as a claim for unliquidated damages, and a party in breach of contract does not incur eo instanti a pecuniary liability, nor does the injured party become entitled to claim a debt. The injured party is only

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233 *Aktieselskabet Reidar v. Arcos* (1927) 1 KB 352 : (1926) All ER Rep 140.

234 *Shiv Ispat Udyog Pvt. Ltd. v. Industries Valley*, AIR 1984 Del 405.

entitled to sue for damages, and have them adjudicated upon. The mere fact that the damages for a breach would be very difficult to assess does not mean that the agreed sum cannot be liquidated damages-on the contrary, this is precisely the situation in which the parties may reasonably wish to agree on the sum payable for breach.

A good example of such a stipulation is where a lump sum is fixed for breach of a covenant, not to compete-loss resulting from such breach is always uncertain in amount and difficult to prove.

Where the parties have provided for compensation in express terms, the right to claim unliquidated damages to that extent is necessarily excluded. In *Chunilal V Mehta v Century Spinning and Mfi Co Ltd*[235]*,* it has been stated:

"Where parties name in a contract reduced to writing a sum of money to be paid as liquidated damages they must be deemed to exclude the right to claim unascertained sum of money as damages. The right to claim liquidated damages is enforceable under s 74 of the Contract Act and where such a right is found to exist, no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach."

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235 *Chunilal V Mehta v Century Spinning and Mfg Co Ltd.,* AIR 1962 SC 1314, p. 1319 : [1962] 3 Supp. SCR 549.

➢ **Sections 74 does not overlap Section 74:**

This section applies when there is a sum named in the contract as the amount paid in case of breach of contract, or the contract contains any other stipulation by way of penalty.

In *Shiva Jute Baling Limited v Hindley* & *Co Ltd,*[236] an agreement for supply for 500 bales of jute between an Indian company and a British company contained a clause for payment of 'liquidated damages' for default at the difference between the contract rate and rate on the day following the default plus 10 *sh* per ton, and also a provision for arbitration in accordance with the byelaws of London Jute Association. On disputes having arisen, the arbitrators in London gave an award for liquidated damages as given in the agreement, i.e., the difference in rates plus 10 *sh* per ton. The Supreme Court held that the stipulation was valid as also the award. Both Sections 73 and 74 provide for reasonable compensation, but S. 74 contemplates that the maximum reasonable compensation may be the amount which may be named in the contract, but not more, even though according to" Section 73, the amount of compensation may exceed the sum named.

9.5 CONCLUSION:

Any aggrieved or injured party can claim damages under any of the above mentioned heads of damages for breach of contract, and get compensation only if he proves to suffer injury because of the breach committed by the

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236 *Shiva Jute Baling Limited v Hindley* & *Co Ltd,* AIR 1959 SC 1357 : [1960] 1 SCR 569.

defendant. To put it in simple words, one may say that before a person can get any damages, he must prove that he had suffered an injury. Law does not taken into account all harms suffered by a person, which caused no legal injury. The damage so caused is called *damnum sine injuria.* The term '*injuria'* is to be understood in its rightful and proper sense. If such legal injury is proved, it becomes the duty of the Court to do justice to the sufferer but while doing so the Judges have to itemize the damages in order to calculate the interest. This does not mean that the total award is necessarily to go up higher on that count. The total award is still to be one, which gives him fair compensation in money for his injury. Care must be taken to avoid the risk of overlapping. A high future for loss of earnings might go in reduction of the award for pain and suffering and other loss to the so one may say that the difference between contract rates and the accidental rates which prevailed on the date of breach of contract is a reasonable process by which damages are computed and required to be computed.

CHAPTER - X

LEQUIDATED DAMAGES AND PENALTY

10.1 INTRODUCTION:

The parties to a contract may, as part of the agreement between them, fix the amount, which is to be paid by way of damages in the event of breach. In some cases this amount will apply to all breaches, in others only to particular breaches. In some cases it will apply to breach by either party, in others only to breach by one particular party. And sometimes different sums may be stipulated for different breaches, whether by one or by both parties.

Whether the agreed sum is recoverable from the party in breach depends upon whether it constitutes liquidated damages, when it is recoverable, or a penalty, when it is not. The law as to liquidated damages and penalties has a long involved history, and a brief account of the development over the centuries is necessary for a full understanding of the modern law.

The parties to a contract not infrequently make provision in the contract for the damages to be paid on a breach of contract. Such provision does not exclude the application of the rule that damages for breach are intended to compensate for the actual loss sustained by the plaintiff. It is a question of the proper construction of the contract to decide whether a sum fixed in this way, however the parties may have described it, is a 'penalty', in which case it cannot be recovered, or a genuine attempt to 'liquidate', that is to say, to reduce to certainty, prospective damages of an uncertain amount, wherein the sum will be recoverable.

The rule against penalties originates in equity which would relieve against penalties, cutting them down to the actual damage suffered, but was taken up and applied by the common law, and reinforced by statute.[1] The Court will accept as liquidated damages the sum fixed by the parties if it is a genuine pre-estimate of the damage which seems likely to be caused if the breach provided for should occur. The question is one of construction, to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of making the contract, not as at the time of breach.[2] Or, again, if, although it is not an estimate of the probable damage, the parties had fixed that sum because they were agreed in limiting the damages recoverable to an amount less than that which a breach would probably cause, it will similarly be accepted by the Court.[3] On the other hand, if the sum was fixed in *terrorem*, the provision will be considered to be a penalty. It will be unenforceable.

In construing the terms 'penalty' and 'liquidated damages' when inserted in a contract, the Courts will not be bound by the phraseology used, but will look to the substance rather than to the form. The parties may call the sum specified 'liquidated damages' if they wish, but if the Court finds it to be a penalty, it will be treated as such. Conversely, if the parties had described the sum fixed as a 'penalty', but it turns out to be a genuine pre-estimate of the loss, it will be treated as liquidated damages.[4]

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1 *Wall* v. *Rederiaktieholaget Luggude*, [1915] 3 K.B. 66, at pp. 72-3; Simpson (1966) 82 L.QR.392.

2 *Dunlop Pneumatic T)'re Co. Ltd.* v. *New Garage and Motor Co. Ltd.* [1915] A.C. 79; *Phillips Hong Kong Ltd.* v. *Att.-Gen o/Hong Kong* (1993) 61 Build. L.R. 41 (p.c.).

3 *Cellulose Acetate Silk Co. Ltd. v. Widnes Foundr)'* (192S) Ltd. [1933] A.C. 20, for facts see post, p. 591.

4 *Union Eagle Ltd. v. Golden Achievement Ltd. ;* [1997] 2 W.L.R. 341.

10.2 HISTORICAL DEVELOPMENT:

The question of penalties originally arose in relation to penal bonds. Such a bond consisted of a promise to pay a stated sum of money if another promise was not fulfilled. The exact form of a penal bond was a promise absolute to pay a stated sum, with a condition inserted to the effect that if the main obligation were performed by a certain day the promise to pay the money would be void. The common law courts originally recognised and enforced these penal bonds, but equity early granted relief by means of restraining any action, which was brought for a penalty. This resulted in the common law courts following suit by means of a statute of William III in 1697. This provided that in an action upon a bond the plaintiff must assign one or more breaches of the obligation upon which the bond was conditioned, and, while he remained entitled on proving a breach to judgment for the full amount of the sum promised in the bond, he could only recover by execution the amount of the damage proved to have been sustained by the breach or breaches assigned, although the judgment would remain as a security for future breaches. Since the judgment was still for the amount promised by the bond, this penal sum was still of some practical importance in that it fixed the maximum amount which could be recovered upon the bond.[5]

This provision has now disappeared from the statute book and penal bonds have to all intents and purposes disappeared from the present-day scene. It is therefore

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[5] *White v. Sealy* (1778) Doug. 49; *Wilde v. Clarkson* (1795) 6 T.R. 303. *Beckham v. Drake* (1849) 2 H.L.e. 579 at 598. *per* Williams J.; in *Brett~ v. Burch* (1859) 4 H. & N. 506 at *510. per* Bramwell 8.; and in *Wall v. Rederiaktiebolaget Luggude* [1915] 3 K.B. 66 at 72. *per* Bailhache J.

hardly necessary to load down a textbook on the modern law with the many eighteenth-century and early nineteenth - century cases on penal bonds: They have now only an historical interest.

(1) Sums agreed to be paid as damages for breach of contract:

After the penal bond came the sum agreed to be paid for breach of contract. This reversed the position: no longer was the penalty put as the primary obligation in the wording of the agreement. This type of case made its appearance in the course of the eighteenth century and with Lord Mansfield's judgment in *Lowe v. Peers*[6] in 1768 the law began to take shape. He said there that
"covenants secured by a penalty or forfeiture ... the obligee ... may either bring an action of debt for the penalty, and recover the penalty; (after which recovery of the penalty, he cannot resort to the covenant; because the penalty is to be a satisfaction for the whole:) or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties".*

This laid down, therefore, that the plaintiff had an election between suing for the penalty or for such damages as he could prove in the ordinary way, but Lord Mansfield did not suggest that the plaintiff, where he elected to sue for the penalty, would be unable to recover the whole penalty at common law, although he did say that equity would relieve against a penalty as opposed to a covenant "to pay a particular liquidated sum". Not until 1801 in *Astley v. Weldon,*[7] a case which may be regarded as establishing

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6 *Lowe v. Peers,* (1768) 4 Bur. 2225.
7 *Astley v. Weldon,* (1801) 2 B. & P. 346.

the liquidated damages doctrine,[8] was it clearly laid down that if a plaintiff sued for a penalty he was not entitled even at common law to recover more than the actual damage which he could prove he had incurred. Implied in this decision was the proposition that if the sum were a pre-estimate of loss it would not be regarded as a penalty and could be recovered as liquidated damages. The election given to the plaintiff in the case of a penalty[9] to sue for the penalty or for breach of contract disregarding the penalty was retained. A different rule from that applying to penal bonds was thus laid down in that the stipulated sum did not fix the maximum amount that the plaintiff could recover, provided that he ignored the penalty and sued in assumpsit for damages.[10] Only if he sued in debt for the penalty itself would he impose a ceiling on his recovery.[11]

These rules became established without much being said about the statute of William III despite the fact that it applied to such clauses in contracts as much as to penal bonds: thus Lord Mansfield failed to qualify his statements in *Lowe v. Peers*[12] by reference to it. In a number of the cases the court, or one member of the court, introduced the statute into the decision[13] and sometimes specifically

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8 In *Wallis v. Smith* (1882) 21 Ch.D. 243, CA., at 261.

9 *Lowe v. Peers* (1768) 4 Bur. 2225.

10 *Winter v. Trimmer* (1762) 1 Wm.Bl. 395; *Harrison v. Wright* (1811) 13 East 343; *May/am v. Norris* (1845) 14 L.J.CP. 95; *Wall v. Rederiaktiebo/aget Luggude* [1915J 3 K.B. 66..

11 *Harrison v. Wright* (1811) 13 East 343 at 348. *per* Lord Ellenborough CJ.; *Wall v. Rederiaktiebolaget Luggude* [1915] 3 K.B. 66 at 72, *per* Bailhache J.

12 *Lowe v. Peers,* (1768) 4 Bur. 2225.

13 *Astley v. Weldon* (1801) 2 B. & P. 346 at 354 itself; see also *Harrison v. Wright* (1811) 13 East 343 at 341, *per* Lord Ellenborough CJ.; *Davies v. Penton* (1827) 6 B. & C 216 at *224,per* Holroyd and Littledale JJ.; *Elphin.I'tone v. Monkland Iron and Coal Co.* (1886) II App.Cas. 332 at *346, Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda* [J 905J A.c. 6 at 10.

pointed out that the statute applied as much to penalty clauses in a contract as to penal bonds,[14] but generally the statute was ignored. In *Betts v. Burch*[15] Bramwell B. commented on this. He said:

"As to the authorities it is remarkable that from the first to the last the statute is not mentioned. It seems as if, by some singular instinct, the courts have been right, though without referring to the statute by which they ought to have been governed. I believe that the reason is that the judges have considered when equity would have relieved."

This eclipse of the statute had become total in the twentieth century even before the repeal of the relevant provision in it, so that, although the results reached in the cases were consonant with its requirements, it was in practice a dead letter.[16]

(2) The criterion of the intention of the parties:

For a time the courts attempted to justify their interference in these contracts by stating that they were implementing the intention of the parties. Such a claim required them to look to the terminology used in the contract. The contract in *Astley v. Weldon*[17] itself had used neither the term "liquidated damages" nor the term "penalty" but soon after in *Smith v. Dickenson*[18] a clause was held to he a penalty because, it was said, the use of that term clearly prevented the court from holding that the provision was for liquidated

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14 *Betts v. Burch* (1859) 4 H. & N. 506 at 510.; *Wall v. Rederiaktiebolaget Luggude* [1915] 3 K.B. 66 at 72.
15 *Betts v. Burch,* (1859) 4 H. & N. 506 at 511.
16 cf *Sparrow v. Paris* (11'62) 7 H. & N. 594 at 599.
17 *Astley v. Weldon,* (1801) 2 B. & P. 346.
18 *Smith v. Dickenson,* (1804) 3 B. & P. 630.

damages while conversely, in *Reilly v. Jones,*[19] it was said that no case had been adduced in which a clause had been held to be a penalty where the parties had used the terminology of liquidated damages. However, when in 1829 in *Kemble v. Farren,*[20] another milestone case, an amount expressed to be liquidated damages by the parties was held to be a penalty by the court, the bankruptcy of such an interpretation was clear. This, however, was only slowly realised,[21] and, furthermore, there was as yet no clearly developed test to take the place of the test of the parties' intention. As Righy L.J. said at the end of the nineteenth century in *Willson v. Love:*[22]

"The history of the decisions appears to me to lead to the conclusion that the courts made a mistake when they departed in regard to these cases from the general rule that effect ought to be given to the terms of the agreement entered into by the parties, and that, when once the rule was departed from, it became extremely difficult to arrive at any clear rule on the subject."

And, indeed, the numerous nineteenth-century cases show some confusion and not infrequent difficulty in reconciling,[23] a factor, which must be recognised when relying on them as precedents. Perhaps today they are of real value only as illustrations of type-situations.

10.3 DEVELOPMENT OF MODERN LAW:

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19 *Reilly v. Jones,* (1823) 1 Bing. 302.
20 *Kemble v. Farren,* (1829) 6 Bing. 141.
21 *Boys v. Ancell* (11'39) 5 Bing.N.C 390
22 *Willson v. Love,* (1896) 1 Q.B. 626, C.A., at 633.
23 *Re Newman* (1876) 4 Ch.D. 724. C.A; *Wallis v. Smith* (1882) 21 Ch.D. 243, C.A.

The law has been re-stated for today in a number of authoritative decisions of the House of Lords and Judicial Committee at the beginning of the century, culminating in 1915 in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*[24] where Lord Dunedin reframed in a series of "rules" the principles for ascertaining whether a stipulated sum is liquidated damages or penalty. Upon these cases and upon these rules the modern law rests,[25] at the end of the century the Judicial Committee in *Philips Hong Kong v. Attorney-General of Hong Kong*[26] has endorsed their approach, while stressing the need for that approach to be realistic.

- **Rules of Construction:**

The leading case on penalties is that of *Dunlop Pneumatic Tyre Co. Ltd. V. New Garage and Motor Co. Ltd.*

The appellant sold motor tyre-covers, tyres and tubes to the respondent which contracted not to resell them, or offer them for sale, at a price below the appellant's list prices and to pay the sum of £.5 by way of liquidated damages for every breach of this agreement. The respondent sold a tyre-cover at less than the list price, and was sued by the appellant for damages for breach.

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24 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* [1915] A.C. 79. *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda*, [1905] AC. 6; *Public Works Commissioner v. Hills*, [l9061 A.C. 368; *P.C.; Webster v. Bosanquet*, [1912] A.C. 394 P.C.; *De Soysa v. De Pless Pol,* [1912] A.C. 194. P.C.

25 *cf Widnes Foundry v. Cellulose Acetate Silk Co.,* [1931] 2 K.B. 393. C.A. at 405; *Dunlop Pneumatic Tyre Co. v. New Garage* & *Motor Co.*

26 *Philips Hong Kong v. Attorney-General of Hong Kong,* (1993) 61 B.L.R. 41, P.C.

The House of Lords held that the sum fixed by the parties was a genuine pre-estimate of the damage, which might ensue and not a penalty. In the course of his speech Lord Dunedin laid down the following rules:

(I) 'It will be held to be a penalty if the sum stipulated for its extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.'

An illustration was provided by the Earl of Halsbury in an earlier case, where he said:[27]

For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for £.50, you were to pay a million of money as penalty, the extravagance of that would be at once apparent.

We shall see that there is considerable doubt as to how far this principle extends to the forfeiture of a sum already paid. But in other situations the question is one of fact in each particular case. The purpose of such clauses is to promote certainty and, especially in commercial contracts, where the parties are able to protect themselves, the Court is likely to take the view that "hat the parties have agreed should normally be upheld and to take care not to set too stringent a standard which could defeat that purpose.[28] In the case of consumer contracts for the supply of goods or services, the common law rule has been embodied in a legislative presumption that a term requiring a consumer

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27 *Clydebank Engineering and Shipbuilding Co. Ltd. v. Don Jose Ramos Yzquierdo y Castaneda*, (1905) A.C. 6, at p.10.

28 *Phillips Hong Kong Ltd. v. Attorney General of Hong Kong*, (1993) 61 Build. L.R. 41 (P.C.).

who fails to fulfill his obligation to pay a disproportionately high sum in compensation is unfair and not binding.

(II) 'It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to hare been paid.

In *Kemble v. Farren*:[29]

The defendant agreed to perform at the Covent Garden Theatre for four seasons at £3 6s 8d. a night. The contract provided that if either party refused to fulfill the agreement or any part thereof, such party should pay to the other the sum of £1,000 as 'liquidated damages'. The defendant refused to perform during the second season.

It was held that the stipulation was penal. The obligation to pay £1,000 might have arisen upon a failure to pay £3 6s. 8d. and was therefore quite obviously a penalty. The most obvious example of this presumption is where a borrower of money promises to pay the lender an additional sum if the money is not repaid by a fixed day. Such 'accelerated payment' clauses are common in sales by installments and leasing arrangements. However, a distinction is drawn between contracts, which accelerate an existing liability to pay on default and those which create or increase the liability to pay. The penalty rules do not apply to the former.[30] The distinction is, however, open to criticism on the ground that it is commercially unrealistic to hold that a debt which can only be recovered by installments over a

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29 *Kemble v. Farren,* (1829) 6 Bing. 141.

30 *Protector Loan Co. v. Grice*, (1880) 5 QBD. 529; *O'Dea v. All States Leasing System Pvt. Ltd.*, (1983) 152 C.L.R. 359;

period is to be equated with one which can be recovered immediately and as permitting the circumvention of this rule of construction by contractual stipulation for discount if payment is made by a given date.

But even where the penalty rules apply, the presumption may be rebutted if the increase is, in the circumstances, commercially justifiable and the dominant purpose of the provision is not to deter the borrower from breach. Thus, it has been held that a provision increasing by one per cent the interest chargeable on a loan from the time a borrower defaulted reflected the increased credit risk of having such a debtor, and was not therefore a penalty.[31]

(III) 'There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more of all of several events, some of which may occasion serious and others but trifling damage.

An illustration is offered by *Ford Motor Co. v. Armstrong*[32]

A retailer of motorcars agreed with a manufacturer inter alia not to sell anyone of the manufacturer's cars, or any part, below the listed price. For every breach of this agreement he was to pay £250, as 'agreed damages'.

A majority of the Court of Appeal held that this was a penalty. The defendant might have become bound to pay the sum of £250 for the breach of some term, which would

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31 *Lardsvale Finance Plc v. Bank of Zambia*, (1996) Q.B. 572.
32 *Ford Motor Co. v. Armstrong,* (1915) 31 T.LR. 267.

cause only trifling damage. Similarly in *Kemble v. Farren,*[33] the same factor provided an additional reason for the Court to hold that the £1,000 was a penalty because that very large sum was to become immediately payable if 'the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant'.

A single sum, as opposed to a sum proportioned to the seriousness of the breach (for example per week for delay or per item for items sold in breach of covenant), is presumed to be penal because one tests it against the least serious breach possible. The presumption does not apply where the sum is payable for breach of a single obligation which can be broken in a number of ways, for example non-completion of a building contract.[34] Where it is difficult to estimate the loss and it is therefore uncertain that losses from one breach would be greater than those from another, a court may hold that the presumption is rebutted. It may also be rebutted where it is clear that the contractual provision has sought to average out the probable losses from all the breaches provided, however, that the disparity is not too great.[35]

On the other hand:

(IV) 'It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility.'

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33 *Kemble v. Farren,* (1829) 6 Bing. 141.

34 *Law v. Local Board of Redditch*, (1892) 1 Q.B. 127.

35 *Dunlop Pneumatlr Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* [1915J A.C 79, at p. 99.

For example, in the Dunlop Tyre case itself, the stipulated sum of £5 could only, at the most, be a very rough and ready estimate of the possible damage, which might be suffered if a trader undercut the manufacturer's listed price. In public works contracts, such as those for the construction of roads or tunnels, the nature of the loss may in part be non-financial and therefore be particularly difficult to evaluate, but in *Phillips Hong Kong Ltd. v. Attorney-General of Hong Kong*[36] it was said that a clause using a formula based on estimates of the loss of return on the capital at a daily rate, the effect of the delay on related contracts, and increased costs, was said to be sensible.

But these rules are no more than presumptions as to the intention of the parties; they may be rebutted by evidence of a contrary intention, appearing from a consideration of the contract as a whole.[37]

- **English law, liquidated damages and penalty:**

It will be observed that the rule of English law against penalties is "an irrational doctrine bequeathed to people in England by a school of English Judges, eminent, no doubt, in the law. But over-prone to making agreements for parties which the parties had not made and did not intend to make for themselves."[38] But there has been an age-long controversy as to whether a provision in a contract that in the event of one party committing a breach of the covenant he shall be mulcted in a certain amount is to be treated as

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36 *Phillips Hong Kong Ltd. v. Attorney-General of Hong Kong,* (1993) 61 Build. L.R. 41 (P.C.).

37 *Pye v. British Automobile Commercial Sundicate Ltd.*, (1906) 1 K.B. 425.

38 *Banke Behari v. Sundar Lal,* I.L.R. 15 All. 232 at p. 253.

penalty not recoverable in full in equity or as liquidated damages literally excisable. It is a matter of frequent occurrence that parties to a contract fix sum of money as being payable on a breach thereof, which according to their true intention, expresses only the maximum amount of damages. In such cases such sum of money is penal in its nature and intent and at Common law the parties were not entitled to recover anything more than the actual damages sustained. On the other hand, owing to the difficulty in foreseeing the extent of the injury and in setting a money value thereon parties may agree upon a certain sum of money as a fixed measure of damages to be payable in case of a breach of the contract. In such cases Courts of law have always treated such a sum as the ascertained amount of damages and allowed it to the aggrieved party. In the former case it is called a "penalty" merely stipulated in *terrorem* against a possible breach of the obligation and in the latter "liquidated damages" which can be regarded as a genuine pre-estimate of the creditor's interest in the due performance of the obligation.[39] The parties may agree by contract that a particular sum is payable on the default of one of them and if the agreement is not obnoxious as a "penalty", such a sum constitutes "liquidated damages" and is payable by the party in default. The term is also applied to sums expressly made payable as liquidated damages under a statute. In every other case where the Court has to quantify or assess the damages or loss whether pecuniary or non-pecuniary, the damages are "unliquidated".[40]

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39 *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo,* (1905) A.C.6.

40 Halsbury's *Laws of England*, 4th Edn., Vol. 12 p. 415.

10.4 CONCEPT OF LIQUIDATED DAMAGES AND PENALTY IN ENGLISH LAW:

The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other, or may agree that in the event of breach by one party any amount paid by him to the other shall be forfeited. If this sum is a genuine pre-estimate of damages likely to flow from the breach, it is called 'liquidated damages'. If it is not a genuine pre-estimate of the loss, but an amount intended to secure performance of the contract, it may be a penalty. In *Fateh Chand v Balkishan Das*,[41] the Supreme Court stated:

... s 74 declares the law as to liability upon breach of contract where compensation is by agreement of parties predetermined or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party. It merely declares the law that notwithstanding any term in the contract for determining the damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated.

Section 74 provides for the measure of damages in two classes:

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41 *Fateh Chand v Balkishan Das* , [1964] 1 SCR 515, P 526 : AIR 1963 SC 1405, P 1412; *Naresh Chandra Sanyal v Calcutta Stock Exchange Assn Ltd;* AIR 1971 SC 422, P 428.

(i) where the contract names a sum to be paid in case of breach; and

(ii) where the contract contains any other stipulation by way of penalty. In both the cases the measure of damages is by s 74, reasonable compensation not exceeding the amount or penalty stipulated for.[42] It has been observed that in comparison with the extensive power that contracting parties have to bargain over their substantive contract rights and duties, their power to bargain over their remedial rights is surprisingly limited. The most important restriction is the one denying them the power to stipulate in their contract a sum of money payable as damages that is so large as to be charecterised as a 'penalty'.[43]

10.4.1 The Amendment of 1899:

The original section has been amended by the Indian Contract (Amendment) Act 1899, adding the words shown in italics in the section, and illusts (d), (e), (f), and (g). The marginal note to the section was also altered. There is no doubt that, as the section originally stood, it was intended to do away with the distinction between a penalty and liquidated damages.[44] The sole object of the section[45] appears to have been to provide for the class of cases to which *Kemble v Farren*[46] belongs, and in which the distinction between 'liquidated damages' and 'penalty' has given rise to so much difference of opinion in the English courts.

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42 *Fateh Chand v Balkishan Das* [1964] 1 SCR 515, pp 526-527, AIR 1963 SC 1405, pp 1410-1411; *Shree Hanuman Cotton Mills v Tata Air Craft Ltd* [1970] 3 SCR 127, AIR 1970 SC 1986, P 1997.

43 Fansworth, *Contract*, 3rd Edn., p.841.

44 *H. Mackintosh v. Complainant Crow*, (1883) ILR 9 Cal 689.

45 *Umarkhan Mahamadkhan Deshmukh v Salekhan;* (1893-94) ILR 17-18 Born 70, p III per Sargent CJ.

46 *Kemble v Farren* , (1829) 6 Bing. 141, (1824-34) All E.R. .Rep 641.

10.4.2 Alternative Promises:

Where a contract provides that one of the parties shall do a certain thing or pay a certain sum of money and in the event of failing to perform as agreed upon. He shall perform other act. the transaction may be viewed in either of two ways. In the first place, it may be viewed as contract giving the promisor the choice of two alternatives, namely of performing the one, if he fails to perform the other. For instance, if a man takes a land on lease for pasture at a certain rent, with a stipulation to pay a different sum if he cultivates it, two alternative courses are open to either of which he can perform. In such cases, the parties have fixed the price on payment of which the promisor is absolved from the duty of performing the first promise and the failure to perform that constitutes no breach of contract.

10.4.3 Primary and Secondary Promises:

On the other hand, the primary object of the parties may be the performance of the first promise, and it may be merely with a view to secure that performance that the second promise is added. When this is the intention of the parties, the promisor has no choice in the matter and refusal on his part to perform the first and substantive promise amounts to a breach of contract.[47] In the latter case the stipulation for the performance of the second or alternative promise becomes according to the intention of the parties, a penalty or a thing which liquidates and discharges the result of the non-performance of the first promise.

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[47] Cunningham and Shepherd Commentaries on the Indian Contract Act p. 258: the observations of Sundarayya, J., *Muthukrishnian v. Sankaralingam Pillal*, I.L.R. 36 Mad. 229 at p. 251 : 18 I.C. 414 at p. 436: *Ramdhan v. Mohanlal*, I A.L.J. 688: *Soodamani Pattar v. Somasundaram Mudaliar*, 4 M.L.J. 201.

10.5 NATURE AND EFFECT OF LIQUIDATED DAMAGES:

A sum of money which has been agreed to be paid on a particular eventuality falls to be classified as liquidated damages or a penalty only where that eventuality is a breach of contract between the contemplated payer and the contemplated payee. This appears to be a straightforward, even self-evident, proposition but an unsuccessful attempt to challenge it, and to extend the law as to penalties to a wider sphere, was taken to the House of Lords in *Export Credits Guarantee Department v. Universal Oil Products Co.*[48] The defendants there had contracted to construct an oil refinery for a group of Newfoundland companies. Bankers had provided the financing of this project in return for the issue of promissory notes by the companies and for the plaintiffs' guarantee of the promissory notes. By a further contract between the plaintiffs and the defendants the plaintiffs required the defendants, in the event of their default in their performance of the construction contract, to indemnify the plaintiffs against any liability they might incur under the contract of guarantee. Some promissory notes were dishonoured, the plaintiffs duly indemnified the bankers under the contract of guarantee, and then claimed indemnity for themselves over against the defendants whom they alleged to be in default under the construction contract. The defendants' argument that the sum claimed constituted a penalty was firmly rejected. Their lordships declared themselves to be in complete agreement with the courts below and for the same reasons, which were in effect that the sum in question could not be a penalty as it

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48 *Export Credits Guarantee Department v. Universal Oil Products Co.,* (1983) 1 W.L.R. 399, H.L.

became payable in the event of breach by the defendants of contractual obligations owed not to the plaintiff but to third parties. It was however also pointed out-and this could be of some significance for other cases-that the sum in question represented the actual loss suffered by the plaintiffs.

Jobson v. Johnson[49] established that a penalty, and presumably liquidated damages, may consist not of a sum of money stipulated to be paid on breach but of an item of property stipulated to be transferred on breach. In that case the defendant had contracted to buy shares in a football club for some £350,000 payable in seven instalments. The agreement contained a clause that, if the defendant defaulted on the payment of the second or any subsequent instalment, he was required to transfer the shares back to the sellers for £40,000, an amount which neither was a genuine pre-estimate of the sellers' loss in the event of the defendant's default nor reflected the true value of the shares. The defendant paid £140,000 towards the purchase price, the shares were transferred to him, and he then defaulted on payment of the instalments. The plaintiff, the assignee of the sellers of the shares, claimed specific performance of the agreement for the re-transfer of the shares while the defendant claimed that the re-transfer agreement was a penalty and as such unenforceable. The Court of Appeal agreed with the defendant. Dillon L.J. said:

"Does it make any difference, then, that the penalty in the present case is not a sum of money? In principle, a transaction must be just as objectionable and unconscionable in the eyes of equity if it requires a transfer

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49 *Jobson v. Johnson,* (1989) 1 W.L.R. 1026, C.A.

of property by way of penalty on a default in paying money as if it requires a payment of an extra, or excessive, sum of money. There is no distinction in principle between a clause which provides that if a person makes default in paying a sum of £1 00 on a certain day he shall pay a penalty of £1,000, and a clause which provides that if a person makes default in paying a sum of £100 on a certain day he shall by way of penalty transfer to the obligee 1000 shares in a certain company for no consideration. Again, there should be no distinction in principle between a clause which requires the defaulter, on making default in paying money, to transfer shares for no consideration, and a clause which in like circumstances requires the defaulter to sell shares to the creditor at an undervalue. In each case the clause ought to be unenforceable in equity in so far as it is a penalty clause."[50]

(1) Nature: genuine pre-estimate of damages as against a sum fixed in *terrorem*.

Where the parties to a contract, as part of the agreement between them, fix the amount which is to be paid by way of damages in the event of breach, a sum stipulated in this way is classed as liquidated damages where it is in the nature of a genuine pre-estimate of the damage which would probably arise from breach of the contract. This is the modern phrase used to define liquidated damages, first appearing in Lord Robertson's speech in *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda*[51] and later incorporated by Lord Dunedin in his

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50 *Jobson v. Johnson,* (1989) 1 W.L.R. 1026, C.A.

51 *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda*, [1905] A.C 6 at 19.

list of "rules"[52] *in Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*[53] *since when, as part of these "rules", it has often been resorted to.*[54] The intention behind such a provision is generally to avoid, wherever the amount of the damage, which would probably result from breach, is likely to be uncertain, the difficulty of proving the extent of the actual damage at the trial of the action for breach.

A stipulated sum will, however, be classed as a penalty where it is in the nature of a threat fixed in terrorem of the other party. This is again the modern phrase, also to be found in *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda,*[55] this time in Lord Halsbury's speech, and also incorporated by Lord Dunedin in his list of "rules" in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co*. The intention behind such a provision is generally to prevent a breach of the contract by establishing a greater incentive for its performance. The onus, however, of proving that a stipulated sum is a penalty rather than liquidated damages is upon the party against whom the stipulated sum is claimed.[56]

The same sum cannot, in the same agreement, be treated

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52 These rules, of which this was the second, are considered later: see §§ 491-514. infra. The second rule runs thus: "The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage."

53 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915] A.C 79, 86. He had already made use of the phrase in *Public Works Commissioner v. Hills* (1906] A.C 368, P.C at 375-376.

54 *e.g.* by Scrutton L.J. in *English Hop Growers v. Dering* [1928] 2 K.B. 174. CA .. at 181.

55 *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda,* (1905) A.C. 6.

56 *Robophone Facilities v. Blank* [1966)1 W.L.R. 1428, c.A.. at 1447, *per* Diplock L.J.

as a penalty for some purposes and as liquidated damages for others. For if the same sum is extravagant and unconscionable in relation to one breach to which it applies it cannot be a genuine pre-estimate, and the sum becomes branded as having a penal nature which it cannot lose in relation to other more serious breaches to which it also applies. It adds nothing to say that it would not have been a penalty as to the other breach or breaches, or that it is the other breach or breaches that have in the event occurred. Nor will the court make any severance for the parties, once they have tampered with penal stipulations. The parties should make their own severance at the time of the making of the agreement. They may either stipulate separate sums for the various possible breaches,[57] in which case one sum may be held to be a penalty while another stands as liquidated damages. Alternatively, they may contract that the stipulated sum shall apply to only one or some breaches, and leave the other breaches to be compensated for in the ordinary way by an action for unliquidated damages.

At the same time a realistic approach is essential and it is salutary to heed Lord Woolf, speaking for the court, in *Philips Hong Kong v. Attorney-General of Hong Kong*[58] He said there:

"Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the

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57 e.g. *Imperial Tobacco Co. v. Parslay*; (1936) 2 All E.R. 515, C.A.

58 *Philips Hong Kong v. Attorney-General of Hong Kong,* (1993) 61 B.L.R. 41, P.C.

provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and be a perfectly valid liquidated damages provision. The use in argument of unlikely illustrations should therefore not assist a party to defeat a provision as to liquidated damages."

He elaborated on this point later in the judgment in a useful passage, saying:

"Arguments based on hypothetical situations where it is said that the loss might be less than the sum specified as payable as liquidated damages ... should not be allowed to divert attention from the correct test as to what is a penalty provision-namely is it a genuine pre-estimate of what the loss is likely to be? - to the different question, namely are there possible circumstances where a lesser loss would be suffered?"

(2) Effect of holding a stipulated sum to be liquidated damages or a penalty:[59]

(a) Sum held to be liquidated damages:

The courts implement the intention of the parties in the case of liquidated damages by holding the plaintiff entitled to recover the stipulated sum on breach, without requiring

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59 *Jobson v. Johnson [1989]1* W.L.R. 1026, CA..

proof of the actual damage and irrespective of the amount,

if provable, of the actual damage. Moreover, it should be appreciated that the concept of a duty to mitigate is entirely foreign to a claim for liquidated damages. Thus in *Abrahams v. Performing Rights Society,*[60] where an employer summarily dismissed an employee under a contract which provided that the employer could give two years' notice or pay salary in lieu of notice it was held that if the employee's entitlement to claim the payment in lieu of notice was by way of liquidated damages-he was in fact held to be entitled to claim the money as a contractual debt so that no question of damages arose the full amount would be payable and could not be reduced by any substitute moneys the plaintiff earned during the two years.

In most cases where the plaintiff has recovered his liquidated damages the stipulated sum has been greater than the actual, or at least the provable, damage. However, just as this cannot diminish his damages, so he cannot increase them by ignoring the liquidated damages clause in the rare case where the actual damage is demonstrably greater than the stipulated sum, a situation most likely to arise where one sum is stipulated to be paid on a number of varying, yet uncertain, breaches and the most serious breach is the one which occurs. Thus in *Diestal v. Stevenson,*[61] where a contract for the sale of coal provided that for every ton not delivered or not accepted the party in default should pay one shilling, the seller, in an action for non-delivery, was held limited to this sum despite his

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60 *Abrahams v. Performing Rights Society,* (1995) 1 C.R. 1028, C.A.

61 *Diestal v. Stevenson,* (1906) 2 K.B. 345.

greater loss. And in *Talley v. Wolsey - Neech,*[62] where a

contract of sale of land provided for liquidated damages on the buyer's failure to complete based on the amount of the loss accruing to the seller on a resale by him, it was held that the seller was confined to this amount and could not claim further damages by way of interest in addition.[63] These cases show that the plaintiff can neither claim unliquidated damages in addition to the liquidated damages which are designed to deal with the loss that has occurred nor elect to ignore the liquidated damages provision and sue only for unliquidated damages.[64]

The plaintiff will, however, be entitled to sue for unliquidated damages in the ordinary way, in addition to suing for the liquidated damages, if other breaches have occurred outside those which fall within the ambit of the liquidated damages provision or, it seems, if only part of the loss arising from a single breach is regarded as falling within the provision's ambit. The position is illustrated by *Aktieselskabet Reidar v. Arcos,*[65] Charterers, in breach of their obligation to load a full and complete cargo by a certain date, took so long to load that the time passed when the ship could carry a summer cargo and she was only able to carry a much smaller winter cargo. The charterparty contained the usual provision for demurrage as liquidated damages for the charterers' detention of the ship in loading, but the owners successfully claimed, in addition to the demurrage, unliquidated damages in the ordinary way for

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62 *Talley v. Wolsey-Neech,* (1978) 38 P. & C.R. 45, C.A.

63 *Cellulose Acetate Silk Co. v. Widnes Foundry*, (1933] AC 20, *Temloe v. Errill*, (1987) 39 B.LR. 30, CA.

64 *Wallace-Turner v. Cole,* (1983) 46 P. & CR. 164; *Talley v. Wolsey-Neech,* (1978) 38 P. & CR. 45. CA.

65 *Aktieselskabet Reidar v. Arcos,* (1927) 1 K.B. 352, C.A.

loss of freight caused by the charterers' failure to load a full and complete cargo. "The provisions as to demurrage", said

Atkin L.J., "quantify the damages, not for the complete breach, but only such damages as arise from the detention of the vessel." And in *Total Transport Corporation v. Amoco Trading Co., The Altus,*[66] where the breach of the obligation of charterers to load a full and complete cargo caused the owners to be entitled to demurrage at a lower rate than that to which they would have been entitled had the full and complete cargo been loaded, the owners successfully claimed, in addition to the liquidated damages by way of so-called dead freight representing freight on the amount of cargo which should have been, but was not, loaded, the difference between these two rates. While one may question Webster J.'s view in The Altus that there had been only a single breach of obligation in both that case and in the earlier *Aktieselskabet Reidar v. Arcos,*[67] as there must surely have been a breach not only of the loading obligation but also of the obligation not to delay the ship beyond the lay days,[68] what is important is that, at least in The Altus, the loss for which unliquidated damages were being claimed flowed from the same breach as that for which the liquidated damages had been specified. Webster J. said that he regarded the ratio decided in *Aktieselskabet Reidar v. Arcos*[69] as being that:

"Where a charterer commits any breach, even if it is only

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66 *Total Transport Corporation v. Amoco Trading Co., The Altus,* (1985) 1 Lloyd's Rep. 423.

67 *Aktieselskabet Reidar v. Arcos,* (1927) 1 K.B. 352, C.A.

68 Certainly Sargant L.J. regarded the charterers in *Aktieselskabet Reidar v. Arcos* 11927J I K.B. 352, C.A., *Wallace-Turner v. Cole* (1983) 46 P. & C.R. 164 at 168.

69 *Aktieselskabet Reidar v. Arcos,* (1927) 1 K.B. 352, C.A.

one breach, of his obligation either to provide the minimum contractual load or to detain the vessel for no longer than the stipulated period, the owner is entitled not only to the

Liquidated damages directly recoverable for the breach of the obligation to load (dead freight) or for the breach of the obligation with regard to detention (demurrage), but also for, in the first case, to *[sic]* the damages flowing indirectly or consequentially from any detention of the vessel (if it occurs) and, in the second case, to damages flowing indirectly or consequentially from any failure to load a complete cargo if there is such a failure."[70]

Also in some cases an injunction may prove a suitable remedy but although a plaintiff may elect[71] whether to ask for an injunction or for his liquidated damages, it is generally held that he cannot have both. Thus in *Sainter v. Ferguson,*[72] and again in *Carnes v. Nesbitt,*[73] an injunction was refused because liquidated damages had already been awarded, and this view was adopted in *General Accident Assurance Co. v. Noel*[74] where the plaintiff was put to his election. However, it would seem that the plaintiff should be entitled to have the two remedies where they relate to different breaches. The above three cases, in which an election was insisted upon by the court, concerned covenants in restraint of trade where a single stipulated sum was to become payable if the defendant started

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70 *Total Transport Corporation v. Amoco Trading Co., The Altus,* (1985) 1 Lloyd's Rep. 423.

71 *Young v. Chalkley,* (1867) 16 L.T. 286; *Coles v. Sims* (1854) 5 De G. M. & G. I; *General Accident Assurance Co. v. Noel* [190211 K.B. 377,; *Howard v. Woodward* (1864) 34 L.J.Ch. 47; *Jones v. Heavens* (1877) 4 Ch.D. 636; *National Provincial Bank of England v. Marshall*, (1888) 40 Ch.D. 112, C.A.

72 *Sainter v. Ferguson,* (1849) 7 C.B. 716.

73 *Carnes v. Nesbitt,* (1862) 7 H. & N. 778.

74 *General Accident Assurance Co. v. Noel,* (1902) 1 K.B. 377.

business in competition with the plaintiff, and it was reasonable to regard the two remedies as mutually exclusive. But the situation is different where there is a clause providing a graduated sum to be paid in line with the extent of the breach, as in covenants whereby one party has accepted restrictions on his right to sell his goods and has further agreed to pay the other a specific sum for every item sold in breach of covenant. Here it is reasonable to award liquidated damages for the past, i.e. on the number of items already sold in breach, and an injunction as to the future. This result was reached, without exception being taken, in *Imperial Tobacco Co. v. Parslay.*[75]

(b) Sum held to be a penalty:

The courts refuse to implement the intention of the parties in the case of a penalty. The plaintiff is held entitled to sue and recover for such loss as he can prove in the ordinary way. He cannot even claim to recover the stipulated sum on serious breaches if the clause has been held to be a penalty in respect of some breaches, since, as has been pointed out, the same sum cannot in the same agreement be treated as a penalty for some purposes and as liquidated damages for others. It was said by the Court of Appeal in *Jobson v. Johnson*[76] that strictly the penalty clause remains a term of the contract and is not struck out, but that, if the clause is sued upon, it will not be enforced by the court beyond the amount of the contracting party's loss. This suggested distinction between such a limited suit on the penalty and a claim for unliquidated damages ignoring the penalty, which the contracting party is entitled to pursue, is

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75 *Imperial Tobacco Co. v. Parslay,* (1936) 2 All E.R. 515, C.A.
76 *Jobson v. Johnson,* (1989) 1 W.L.R. 1026, C.A.

largely academic, with either approach generally producing the same result. The distinction mattered in *Jobson v. Johnson* because the penalty, exceptionally, required not the payment of a stipulated sum but the transfer of a stipulated item of property and the court, by a majority, wished to afford the plaintiff a decree of specific performance provided that the value of the stipulated property did not exceed the plaintiff's loss.[77]

In most of the cases where the plaintiff has recovered for his actual damage the stipulated sum has been greater in amount, but just as this cannot augment his damages so he will not be restricted to the penalty in the rare cases where it is less than the actual damage. It might be thought impossible to have what has been categorised as "an extravagant and unconscionable sum" turning out to be less than the actual damage, but such a situation could occur where one sum is stipulated to be paid for a number of breaches of varying importance, as to one of which it is disproportionately large, and a serious breach occurs causing damage greater than the stipulated sum. This has found illustration in charter parties,[78] which early developed a clause stipulating for a single sum to be paid for any non-performance. It was held in *Winter v. Trimmer*[79] and again in *Harrison v. Wright*[80] that the plaintiff could ignore this penal stipulation and recover for his greater loss. The same result was reached in this century in *Wall v. Rederiaktiebolaget Luggude*[81] where Bailhache J. retraced the law in a very useful judgment, which remains the clearest authority for

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77 *Beckham v. Drake* (1849) 2 H.L.E. 579; *Gerrard v. Clowes* [1892] 2 Q.B. 11.

78 *Mayiam v. Norris* (1845) 14 L.J.C.P. 95.

79 *Winter v. Trimmer,* (1762) 1 Wm. Bl. 395.

80 *Harrison v. Wright,* (1811) 13 East 343.

81 *Wall v. Rederiaktiebolaget Luggude,* (1915) 3 K.B. 66.

the present rule. However the wording of the clause had become more complex and the earlier cases provide more useful illustrations of circumstances in which a penalty is likely to turn out less than the actual damage. The decision itself was approved soon after as to its interpretation of the particular clause as a penalty by the House of Lords in *Watts v. Mitsui,*[82] and, as Scrutton L.J. pointed out in *Widnes Foundry v. Cellulose Acetate Silk Co.*[83] Lord Sumner clearly took the view that "the clause did not prevent the ship owners or charterers from recovering the actual amount of damage, though it might be more than the estimated amount of freight." In view of this line of authority, the occasional dicta, which state that the penalty marks the ceiling of recovery, are unacceptable.[84] They are probably based upon the historical fact that the sum in a penal bond fixed the maximum amount recoverable.[85]

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82 *Watts v. Mitsui,* (1917) A.C. 227.

83 *Widnes Foundry v. Cellulose Acetate Silk Co.,* (1931) 2 K.B. 393, C.A.

84 *Wilbeam v. Ashton,* (1807) 1 Camp. *78,per* Lord Ellenborough: "Beyond the penalty you shall not go; within it, you are to give the party any compensation which he can prove himself entitled to"; *Elphinstone v. Monkland Iron* & *Coal Co.* (1886) 11 App.Cas. 332 at *346, per* Lord Fitzgerald: "The penalty is to cover all the damages actually sustained but it does not estimate them, and the amount of loss (not, however, exceeding the penalty) is to be ascertained in the ordinary way." In *Cellulose Acetate Silk Co. v. Widnes Foundry (1933]* A.C 20 at 26 Lord Atkin wished "to leave open the question whether, where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it, or in a suitable case ignoring it and suing for damages". Diplock L.J. in *Robophone Facilities v. Blank* [1966] 1 W.L.R.1428, referring to this express reservation of opinion, said that the matter was "by no means clear": Lord Atkin's comments are not however quite in point as is shown by his reference to prospective damages; they are more allied to the issue of limitation of liability by way of liquidated damages, which is dealt with elsewhere.

85 *Wall v. Rederiaktiebolaget Luggude* [1915] 3 K.B. 66 at 72, *per* Bailhache J.: "The result of suing for the penalty is therefore that the plaintiff recovers proved damages, but never more than the penal sum fixed"; and similarly *Harrison v. Wright* (1811) 13 East 343 at 348, *per* Lord Ellenborough.

10.6 DAMAGES STIPULATED IN THE AGREEMENT:

Now the question remains the plaintiff is entitled to damages of Rs. 50,000 as stipulated in the agreement and as has been held by the learned Trial Judge. The Court is unable to agree with the finding of the Trial Judge. The Supreme Court in *Fateh Chand v. Balkishan Dass,*[86] has held as under:

"The measure of damages in the case of breach of a stipulation by way of penalty is by Sec. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation, as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated, but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of actual loss or damages it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted. Because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties

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86 *Fateh Chand v. Balkishan Dass,* AIR 1963 S.C. 1405.

knew when they made the contract, to be likely to result from the breach."

Now it remains to be seen whether the sum of Rs. 50,000 as stipulated in the agreement is by way of penalty or liquidated damages. If it is penalty then the plaintiff will have to prove actual damages suffered by him and in case it is liquidated damages then the plaintiff may get the sum named in the agreement, if legal injury is caused. The suit agreement is only for the consideration of Rs.60,000, and it is not possible to accept that for breach of such agreement. Damages of Rs. 50,000 would be suffered. Therefore, the stipulation was by way of penalty. The plaintiff has not invested a single pai in pursuance to the agreement and on the other hand he has taken refund of advance payment. So without incurring any loss the plaintiff wants damages of Rs.50,000 which he cannot get as liquidated damages also as no injury has been caused to him. Therefore, the plaintiff is not entitled to any damages for breach of agreement even if it is assumed that the agreement is enforceable.[87]

In the instant case, the plaintiff claimed damages to a tune of Rs.6,000 and for execution of the sale-deed. Held that there being no claim for damages by notice from any side. the plaintiff is not entitled to the damages as stipulated in the contract. It will also be inequitable to award any damages in the facts and circumstances of the case. He is entitled only to specific performance of the contract and delivery of possession of the land in question.[88]

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87 *Sardar Gurubax Singh Gorowara v. Begum Rafiya Khurshid,*, 1979 M.P.L.J. 96 at pp.99, 100.

88 *Hadupani Sabato v. Ganta Ratnam*; (1981) C.L.T. 87 at pp. 89. 97.

10.7 AMOUNT STIPULATED BY THE PARTIES:

When may be taken into consideration.-In a recent decision of the Supreme Court in *MaulaBux v. Union of India,*[89] Sec.74 of the Contract Act has been considered. From the observations, in that case it follows that in a case where it is not possible for the Court to assess the compensation arising from the breach, the amount stipulated by the parties, if it is found to be reasonable and is a genuine pre-estimate of the loss or damage suffered by the party who complained of the breach, could be taken into consideration as a measure of reasonable compensation. But if the amount stipulated is either excessive or exorbitant or unconscionable. The Court would not take that amount as representing reasonable compensation. In a case where the loss can be ascertained in terms of money also the amount stipulated may not represent the correct measure of compensation.[90]

10.8 SUM STIPULATED BY WAY OF GENUINE PRE-ESTIMATE OR PENAL:

A distinction has to be made in the instant case between the case where the sum stipulated is by way of a genuine pre-estimate and the case where it is by way of penalty. Even in the former case, what is awardable for breach of contract is reasonable damages not exceeding the amount so named. Thus, even assuming that the instant case is one where there is a sum named as payable by way of damages and that such a sum is a pre-estimate by the parties, even then, the plaintiff would be entitled only to reasonable

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89 *MaulaBux v. Union of India,* A.I.R. 1970 S.C. 1955 : (1970) 2 S.C. J. 249.

90 *Vankineni Sadasiva Chakradhara Rao v. Sri Sardar Pratap Singh*. (1975) 2 Andh. W.R. 117 at p. 121.

damages not exceeding the amount so named. In this view of the matter also, the plaintiff company would not be entitled to a sum higher than Rs. 1,380 as compensation. It is clear view that having regard to the terms of Cl. 18 of the service agreement which does not provide for graduated damages, but which provides for compensation to be paid on the basis of a set formula and this is irrespective of the length of service or the period of specialized training and the nature of the breach, the formula set up would work out a sum payable by way of compensation, which would be out of all proportion to the legal injury sustained by the company for breach of the service contract by the defendant. Thus, the stipulation in the covenant is one in terrorem of the defendant and is in the nature of a penalty and the plaintiff-company would be entitled to a reasonable compensation. Assuming that it is in the nature of liquidated damages, even then, taking an integrated view of all the facts and circumstances of the case including the nature and length of the service and the terms of the contract, the plaintiff-company would not be entitled to anything more than the reasonable compensation not exceeding the maximum amount to be worked out with the aid of the set formula. In either event, therefore, the plaintiff would be entitled to a sum of Rs. 1,380 only instead of Rs. 3.945 as reasonable compensation.[91]

10.9 DISTINCTION BETWEEN LIQUIDATED DAMAGES AND PENALTY:

The distinction between penalties and liquidated damages depends upon the intention of the parties to be gathered from the whole of the contract. If the intention is to secure

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91 *Arendra Singh MotHal Johary v. Karamchand Prernchand,* 1969 GLR 584 at pp. 599. 600.

performance of the contract by the imposition of a fine or penalty, then the specified sum is a penalty. The essence of penalty is a payment of money as in *terrorem.*[92] If, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages.[93] The Courts refuse to be bound by the mere use of the word "liquidated damages" or "penalty" and will look to what must be considered, in reason, to have been intended by the parties in relation to the subject-matter.[94]

At common law, parties could name a penal sum as due and payable in the event of breach and the named sum according to the true intention of the parties could represent damages. Parties to a contract were also free by common consent to assent to a fixed measure of damages to avoid the difficulty that very often is found in quantifying the compensation. The use of the term penalty or liquidated damages by itself is not decisive and as was pointed out in the case of *Kemble v. Farren,*[95] even what is described as liquidated damage could turn out to be penalty on the facts of a given case. The essence of a penalty was a payment of money stipulated as in terrorem while the essence of liquidated damages is a genuine covenanted pre-estimate of damages. As has been pointed out by the Judicial Committee in *Miehel Habib v. Sheikh Suleiman El Taji El FarouquL*[96] A penal stipulation cannot be enforced. Liquidated damages must be the result of a genuine pre-estimate of damages and they do not include a sum fixed in

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92 *Kanak Kumar! v. Chandan La!*, AIR 1955 Pat. 215 at p. 222; *Badhava Singh v. Charan Singh,* AIR 1955 Raj. 87 at p. 89 at; *Union of India v. Vasudeo Agarwal;.* AIR 1960 Pat. 87 at p. 91.

93 *Law v. Redditch Local Board,* (1892) 1 g.B. 127: 61 L.J.g.B. 172.

94 *Magee v. Lavell.* (1874) L.R 9 C.P. 107: 43 L.J.C.P. 131 ;

95 *Kemble v. Farren,* (1829) 6 Bing., 141 : 31 R.R. 366.

96 *Miehel Habib v. Sheikh Suleiman El Taji El FarouquL,* AIR 1941 P.C. 101.

terrorem As was pointed out by the Supreme Court in the case of *Fateh Chand v. Balkishan Dass,*[97] the question was one of construction of a contract to be judged as at the time it was made, and mere description as penalty or liquidated damages though relevant was not decisive.[98]

Penalty or liquidated damages cannot be taken as such on merely being so described. A penalty is a sum of money so stipulated in *terrorem*, and liquidated damages are a genuine pre-estimate of damages. They are to be so judged on the facts of each case.

The question whether a particular stipulation in a contract is in the nature of penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law, and the intention of the parties incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character, it may operate in *terrorem* over the promisor so as to drive him to fulfill the contract, then the provision will be held to be one by way of penalty.[99] Thus:

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97 *Fateh Chand v. Balkishan Dass,* AIR 1963 S.C. 1405.

98 *State of Orissa v. Calcutta Company Limited;* AIR 1981 Orissa 206 at p. 209.

99 *KP Subbarmna Sastri v. K.S. Raghvan,* AIR 1987 SC 1257.

(a) an amount will be penalty if the sum named is extravagant and unconscionable;[100]

(b) it is penalty if the breach consists in paying of money and the sum stipulated is greater than the sum which ought to have been paid;[101]

(c) there is a presumption (but nothing more) that where a single lump sum is payable as compensation on the happening of one or more events some of which cause serious damage and other trifling,[102] the sum named will be a penalty. In such cases, separate amounts must be fixed for each possible event.

On the other hand;

(d) where it is practically impossible to make a precise pre-estimate of damage a sum stipulated as damages is a true bargain between the parties;[103]

(e) even when a precise pre-estimate of the damage is possible, the parties may fix a sum in the Contract to avoid the trouble and expense assessment.[104]

Whether a stipulated sum is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances, as they existed at the time of

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100 *Clyde Bank Engineering and Shipbuilding Co v. Castaneda;* [1905] AC 6, P 17, [1904-07] All ER Rep 251.

101 *Kemble v. Farren* (1829) 6 Bing 141, [1824- 34] All ER Rep 641.

102 *Elphinstone v Monkland Iron and Coal Co Ltd* (1886) II App Cas 332, p 342; *Interoffice 7i:lephones Ltd v Robert Freeman Co Ltd* [1958] I QB 190, P 194, [1957J 3 AJI ER 479.

103 *Clyde Bank Engineering and Shipbuilding Co v Castaneda;* [1905] AC 6, [1904-07] All ER Rep 251; *Imperial Tobacco Co (of Great Britain and Ireland) Ltd v Parslay* [1936] 2 All ER 515, P 519.

104 *Diestal v. Stevenson* ,(1906) 2 KB 345, p.350.

the contract, and not at the time of its breach.[105] The question whether the stipulated sum is penalty or liquidated damages is a question of construction and of law[106] to be determined by the court,[107] and the literal language of the contract, however clearly expressed, can be disregarded if it does not represent the real nature of the transaction.[108] Lord Dunedin has summed up the distinction between the two in the following proposition;[109]

(1) Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

(2) The essence of a penalty is a payment of money stipulated as in *terrorem* of offending party; the essence of liquidated damages is a pre-estimate of damage.

(3) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent in circumstances

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105 *Public Works Commissioner v Hills [1906] AC 368, [1904-07] AJI* ER Rep 919; *Fateh Chand v Balkishan Das* [1964] 1 SCR 515, P 526, AIR 1963 SC 1405, P 1411; *Phonographic Equipment (1*958) *Ltd v Muslu* [1961] 3 All ER 626.

106 *Wilson v Love* [1896J I QB 626, p 629, [1895-99J All ER Rep 325 (CA), per Lord Esher MR.

107 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1914-15] All ER Rep 739 (HL); *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128.

108 *Bridge v Campbell Discount Co Ltd* [1962] AC 600,[1962] 1 AJI ER 385, P 395 per Lord Radcliffe, [1962] 2 WLR 439 (HL); *Diestal v Stevenson* [1906] 2 KB 345.

109 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, pp 86-88, [1914-15] All ER Rep 739.

of each particular contract, judged at the time of the making of the contract, not as at the time of the breach.

(4) To assist this task of construction, various tests have been suggested, which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are:

(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss, which could conceivably be proved to have followed from the breach.

(b) It will be held to be a penalty, if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum, which ought to have been paid.

(c) There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion, serious and others but trifling damage.

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost impossibility. On the contrary, that is just the situation when it is probable that the pre-estimated damage was the true bargain between the parties.

The above rules are but presumptions as to the intention of the parties, and may be rebutted by giving evidence of contrary intention.[110] The defendant seeking to raise a plea that the amount sought to be recovered as liquidated damages was in the nature of a penalty, was entitled to leave to defend the summary suit filed against him for recovery of damages liquidated in the contract.[111]

The payment will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid, but it may not be a penalty where it is agreed to charge a certain rate of interest with a condition that if the payment is made, a lesser rate will be accepted; nor where the whole sum becomes payable in a contract for payment by installments, in the event of any Installment falling in arrears. Where the stipulation is not a stipulation by way of liquidated damages, viz, it is in the nature of a penalty, it would not preclude a claim for unliquidated damages.[112] If the stipulation is in the nature of penalty, the aggrieved party is still entitled to invoke the conventional remedy of unliquidated damages, but if the stipulation is one of liquidated damages, the provision excludes the claim of un-liquidated damages for that breach. There may, again, be a conventional sum which is neither damages nor penalty, but, as it has been called a 'liquidated satisfaction'[113] the agreed price of liberty to do or omit something. In such a case there is merely a conditional or alternative promise which, if not open to any other objection, will take effect according to its terms.

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110 *Pye v. British Automobile Commercial Syndicate Ltd.* (1906) 1 KB 425.
111 *Roshan Lal v. Manohar Lal* ; AIR 2000 Del 31.
112 *Gopaldas Jethmal v Municipality Hyderabad*; AIR 1949 Sind 1.
113 *Elphinstone v Monkland Iron and Coal Co Ltd*; (1886) 11 App Cas 332, p 347.

10.10 RULES FOR DISTINGUISHING LIQUIDATED DAMAGES FROM PENALTIES:

In one sense it may be said to be a rule for distinguishing liquidated damages from penalties that the one is a genuine pre-estimate of damage and the other a sum fixed in *terrorem*, and indeed this is made the second in Lord Dunedin's list of "rules" in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*[114] However, it is submitted that it is better to regard it as a definition of the two categories, and to treat as rules for distinguishing liquidated damages from penalties only the more detailed tests that are now to be considered. Yet it is well to keep in mind that, whether stated as definition or as rule, it forms the basis of the distinction between the two categories: all the following tests stem from it and are subordinate to it.

(1) The wording used by the parties is of marginal importance:

Lord Dunedin stated as his first "rule" in *Dunlop Penumatic Tyre Co. v. New Garage and Motor Co.* that

> "though the parties to a contract who used the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages".

It is submitted that today even the term "prima facie" is too strong, for in truth the importance of the wording is but a

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114 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) A.C. 79 at 86.

lingering from the early days before *Kemble v. Farren*[115] when the doctrine that the issue turned on the intention of the parties was still in favour. With that doctrine gone, the wording of the parties cannot provide any answer to the basic test of whether or not the amount is a genuine pre-estimate of damage. Ever since the court in *Kemble v. Farren* in 1829 held to be a penalty a sum expressed by the parties to be liquidated damages, there have been numerous cases in which either the like has been held[116] or the converse has been held, i.e. the court has allowed as liquidated damages a provision expressed to be a penalty by the parties,[117] and no cases in which the wording of the parties has turned the scales.[118] It is true that the judges generally go no further in statement than saying that the wording is not "conclusive", a term constantly used by the courts in this connection,[119] but it is submitted that there is more truth in the occasionally found less cautious phrase, such as Bramwell B.'s "the names ... are immaterial[120] or Coleridge C.J.'s "does not depend ... on the words used".[121] However, it remains prudent for parties to use the term "liquidated damages" in framing their contracts, since there

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115 *Kemble v. Farren,* (1829) 6 Bing. 141.

116 *Magee v. Lavell,* (1874) L.R. 9 C.P. 107; Re Newman (1876) 4 Ch.D. 724. C.A.; *Bradley v. Walsh* (1903) 88 L.T. 737; *Public Works Commissioner v. Hills* [1906] A.C. 368, P.c.; also *Landom v. Hurrell* [1955] 1 All E.R. 839 and *Bridge v. Campbell Discount Co.* [1962J A.C. 600.

117 *Crisdee v. Bolton* (1827) 3 C. & P. 240; *Sparrow v. Paris* (1862) 7 H. & N. 594; *Elphinstone v. Monkland Iron Co.* (1886) 11 App.Cas. 332; *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6; *Diestal v. Stevenson* [1906J 2 K.B. 345; *Cellulose Acetate Silk Co. v. Widnes Foundry* [1933] A.C. 20; *Alder v. Moore* [1961]2 O.B. 57, C.A.; *Stewart v. Carapanayoti* [1962] 1 W.L.R. 34.

118 *Kemble v. Farren* (1829) 6 Bing. 141; *Smith v. Dickenson* (1804) 3 B. & P. 630.

119 Lord Atkin in *Cellulose Acetate Silk Co. v. Widnes Foundry;* [1933] A.C. 20 at 25.

120 *Sparrow v. Paris* (1862) 7 H. & N. 594 at 599.

121 *Magee v. Lavell* (1874) L.R. 9 C.P. 107 at 114-115.

is always the slender chance that a court may feel that the other pros and cons so balance out that it is compelled to resort to the wording for its decision.

(2) The circumstances must be viewed as at the time when the contract was made:

Lord Dunedin stated as his third "rule" in *Dunlop Pneumatic Tyre Co. New Garage and Motor Co.*[122] that:

> "the question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and the inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach".

Similar statements of this principle, which has never been doubted,[123] had already appeared in decisions of the highest authorities, while its practical effect had found illustration in *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda.*[124] In that case the defendants had contracted to build for the plaintiffs four torpedo boats to be used in the Spanish-American War of 1898, and the contract stipulated that the defendants should pay the plaintiffs £500 for every week's delay in delivery of each of the four vessels. Delivery was delayed and the plaintiffs successfully claimed the stipulated sums as liquidated damages despite the fact, which was held to

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122 *Dunlop Pneumatic Tyre Co. New Garage and Motor Co.,* (1915) A.C. 79 at 86-87.

123 *Astley v. Weldon,* (1801) 2 B. & P. 346.

124 *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C 6 at *17; Public Works Commissioner v. Hills* [1906] AC 368, P.C, at 376..

be irrelevant, that all four torpedo boats, had they been delivered at the specified time, would have been sunk together with the rest of the Spanish fleet.

(3) A stipulated sum is a penalty if it is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach: otherwise it is liquidated damages: [125]

Lord Dunedin introduced his fourth "rule" in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*[126] thus:

"It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."[127]

This is the principal test for assessing the nature of the sum, i.e. whether pre-estimate or sum fixed in *terrorem*.

The application of this test is very different where there is only a single obligation upon the breach of which the sum becomes payable and where there are several obligations upon the breach of which it becomes payable.

These two situations therefore call for separate consideration.

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125 *Jobson v. Johnson* [1989] 1 W.L.R. 1026, CA., at § 480, *supra.*

126 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) A.C. 79 at 87.

127 *Hadley v. Baxendale,* (1854) 9 Ex. 341; *Robophone Facilities v. Blank* [1966] 1 W.L.R. 1428, C.A., at *1448.*

(a) Where there is only a single obligation upon the breach of which the sum becomes payable

(i) Where the loss is reasonably calculable at the time of contracting, if the loss accruing to the plaintiff from the breach in question can, at the time when the contract was made, be accurately or reasonably calculated in money, the fixing of a larger sum will prima facie be treated as a penalty.

The loss which can be most accurately calculated is that arising from a breach which itself consists of a failure to pay money, and therefore the clearest, and the classic, example of a penalty is a provision that, upon failure to pay a sum of money in breach of contract, a larger sum shall become payable. Although there are no clear examples of this principle in cases where the only event upon which the larger sum becomes payable is the non-payment of the smaller sum,[128] there are plenty of statements of it in the authorities. For present-day purposes the principle is now enshrined in Lord Dunedin's speech in *Dunlop Pneumat;c Tyre Co. v. New Garage and Motor Co.,*[129] where he called it "one of the most ancient instances".[130] However, it is important to emphasise that the basis of this rule depends in turn upon another principle, namely that non-payment of money attracts only nominal damages or at least none beyond interest and that, starting with *Muhammad v. Ali*[131] through *Trans Trust S.P.R.L. v. Danubian Trading Co.*[132] to

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128 c*f Cato v. Cato* (1972) 116 *S.J.* 138.

129 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* [1915] A.C. 79 at 87.

130 *Astley v. Weldon* (1801) 2 B. & P. *346 at 354; Galsworthy v. Strutf* (1848) I Ex. 659 at 665.

131 *Muhammad v. Ali,* (1947) A.C. 414, P.C.

132 *Trans Trust S.P.R.L. v. Danubian Trading Co.,* (1952) 2 Q.B. 297, C.A.

Wadsworth v, Lydall,[133] this principle is slowly being emasculated; this ought to lead in turn to a corresponding emasculation of the principle at present under discussion.[134] The breach consisted of a failure to pay the purchase price in *Muhammad* of land and in Trans Trust of goods and, if there had been a provision that upon failure to pay the price a larger sum should become payable, it is submitted that the larger sum could properly have been considered as liquidated damages.

As to a breach other than a failure to pay money, there appear to be no cases in which a sum, payable only on a single breach, has been held to be a penalty on the ground that the loss was reasonably calculable in money at the time of the making of the contract.

(ii) *Where the loss is not reasonably calculable at the time of contracting.* If on the other hand the loss accruing to the plaintiff from the breach in question cannot, at the time when the contract was made, be accurately or even reasonably calculated in money, it becomes far less easy to class the sum to be paid on breach as extravagant and unconscionable, and here it is likely that the stipulated sum will be held to be liquidated damages. Indeed the difficulty of precise estimation is positively in favour of a holding of liquidated damages, for, as Lord Dunedin pointed out in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*[135]

"It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach

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133 *Wadsworth v, Lydall,* (1981) 1 W.L.R. 598, C.A.

134 *Wallis v. Smith* (1882) 21 Ch.D. 243, CA,

135 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*, [1915] AC 79 at 87-88.

are such as to make precise estimation almost an impossibility. On the contrary that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

A complementary, but slightly different, approach is also frequently found in the cases; this takes the point that the parties are entitled to make provision to bypass the problems set by the difficulty and the expense of proving certain types of damage. Thus Lord Halsbury L.C. said in *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda*,[136] "The very reason why the parties do in fact agree to such a stipulation is that sometimes ... the nature of the damage is such that proof of it is extremely complex, difficult and expensive.[137]

Here too it is difficult to put one's finger on a clear-cut case where only a single possible breach was involved. The closest illustrations are those of a single obligation that can be broken more than once or in more than one way. These, although strictly germane here, are more suitably treated in considering several obligations, since they depend upon the distinction between single and several obligations.

(b) Where there are several obligations upon the breach of which the sum becomes payable.

If there are several breaches upon the occurrence of which the stipulated sum is to become payable, the test for assessing the nature of the sum is still whether it is

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136 *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda,* (1905) A.C. 6 at 11.

137 *Crisdee v. Bolton* (1827) 3 C & P. 240 at 243.; *Kemble v. Farren* (1829) 6 Bing. 141 at 148.; *Green v. Price* (1845) 13 M. & W. 695 at 701.; *Webster v. Bosanquet* (1912) AC 394. P.C. at 398.; *Robophone Facilities v. Blank* [1966] 1 W.L.R. 1428. CA. at 1447.

extravagant and unconscionable in comparison with the greatest possible loss, but there is a much larger chance of its being held a penalty since, as Lord Dunedin pointed out in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,*[138] "if there are various breaches to which one indiscriminate sum to be paid in breach is applied, then the strength of the chain must be taken at its weakest link". This rigorous rule is capable of casting many a stipulated sum into the category of a penalty since practically every contract may be broken more than once, in more ways than one, and by more than one party. Its rigour has been tempered, however, in various ways, all of which have in common that they tend to make the stipulated sum payable only on breach of a single obligation, thus removing it from the ambit of the present category and moving it back into the last. A preliminary step, therefore, is to deal with these various methods before proceeding to deal with the cases, which fall foursquare within the present category.

In the first place, the parties may be careful to delimit the field in which, the sum becomes payable. Thus they may specify that the sum is intended to cover only certain breaches or even only certain aspects of a single breach. There are many common cases: thus where a seller of a business enters into a covenant not to engage in a similar business within a specified radius, there are many other breaches that he may commit in connection with the sale of the business, e.g. a failure to complete or a breach of warranty of quiet enjoyment, and there are all the possible breaches which the buyer may commit: clearly the stipulated sum is not intended to have reference to any of these breaches, and for these, if they occur, an ordinary

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138 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) A.C. 79 at 89.

action for damages will lie.[139] One of the main distinctions between *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*[140] and *Ford Motor Co. v. Armstrong*,[141] is that, that these cases concerning resale price maintenance agreements where the courts came to different conclusions on very similar facts, is to be found here. In both cases the defendant dealer had contracted not to resell the goods below certain prices, not to sell them to certain prohibited persons, and not to exhibit them without the plaintiff's permission; in both, his breach consisted of a breach of the first obligation. Whereas, in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*[142] the sum stipulated to be paid on breach, which was held to be liquidated damages, did not apply to the third and minor obligation not to exhibit without permission, the stipulated sum in *Ford Motor Co. v. Armstrong,*[143] which was held to be a penalty, applied equally to all three obligations.

Alternatively, the parties may stipulate that different sums shall be paid for different breaches. This was done for breaches of different stipulations in *Imperial Tobacco Co. v. Parslay*[144] and the court was, therefore, able to concentrate upon the particular breach which occurred and the particular sum stipulated in relation to it. This sum was in the circumstances held to constitute liquidated damages. And in the case of a different magnitude of breach of the same stipulation, parties commonly introduce graduated

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139 *Aktieselskahet Reidar v. Arcos* [1927]1 K.B. 352. and *Total Transport Corporation v. Amoco Trading Co., The Altus* [1985]1 Lloyd's Rep. 423.

140 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) AC. 79; facts at § 536, infra.

141 *Ford Motor Co. v. Armstrong,* (1915) 31 T.L.R, 267.

142 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) A.C. 79.

143 *Ford Motor Co. v. Armstrong,* (1915) 31 T.L.R. 267.

144 I*mperial Tobacco Co. v. Parslay,* [1936] 2 All E.R. 515..

sums increasing in proportion to the size of the breach. This method has proved particularly useful where the breach has consisted of delay in performance. Thus in a number of cases of building contracts, of which *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda*[145] is the chief,[146] the courts have upheld as liquidated damages a provision that the amount to be paid by the builder in the event of his breach by delay shall be so much for each day, week or other specified short period beyond the time fixed for completion of the construction.[147] Others have successfully adopted the graduated sum where the breach enlarges itself in space rather than in time. Thus the following two provisions were held to constitute liquidated damages. In *Elphinstone v. Monkland Iron and Coal Co.*[148] lessees, granted the privilege of placing slag from blast-furnaces on land let to them, covenanted to pay £100 for every acre of the land that was not restored at a particular date; in *Diestal v. Stevenson*[149] a contract for the sale of coal provided that one shilling for every ton should be paid for that part of the contract which was not executed, whether by failure to deliver by the seller or failure to accept by the buyer. A number of cases has dealt with covenants whereby one party has accepted restrictions on his right to sell his goods and has further agreed to pay the other a specific sum for every item sold in breach of covenant. Generally the court has allowed recovery of such sums as liquidated damages, as in *Dunlop Pneumatic Tyre*

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145 *Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Castaneda,* (1905) A.C. 6.

146 *Law v. Redditch Local Board*, [l892] l Q.B. 127. CA.. *Cellulose Acetate Silk Co. v. Whines Foundry*, [1933] A.C 20 and *Philips Hong Kong v. Allorney General of Hong Kong*, (1993) 61 B.L.R, 41. P.C.

147 *Bridge v. Campbell Discount Co.* [19621 A.C 600.

148 *Elphinstone v. Monkland Iron and Coal Co.,* (1886) 11 App. Cas. 332.

149 *Diestal v. Stevenson,* (1906) 2 K.B. 345.

Co. v. New Garage and Motor Co.,[150] the cases reaching a contrary result have turned on further factors: in *Ford Motor Co. v. Armstrong*[151] the stipulated sum became payable also upon a minor breach other than sale, and in *Willson v. Love*[152] it became payable upon the sale of either of two commodities of substantially different value.

In the second place, the courts do not favour the attempts of defendants to give a narrow meaning to what constitutes a single obligation. Most stipulations can be broken in a number of ways: a former employee who has covenanted not to trade within a certain radius can set up in business five miles away or ten. To use Lord Parker of Waddington's analysis in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,*[153] there is at one end of the scale the case of "a single stipulation, which if broken at all, can be broken once only, and in one way only, such as a covenant not to reveal a trade secret to a rival trader". At the other end of the scale there is the case of a number of different stipulations, whether or not of varying importance. Between lies the case of the stipulation, which "though still a single stipulation, is capable of being broken more than once, or in more ways than one, such as a stipulation not to solicit the customers of a firm". The courts tend to regard any and all breaches of such stipulations as a breach of a single obligation. Thus in *Law v. Redditch Local Board*[154] a sum payable on the non-completion of a building contract was held to be

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150 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co,* [1915] A.C 79. Other cases are *English Hop Growers v. Dering* [1928] 2 K.B. 174. CA.; *Imperial Tobacco Co. v. Parslay* [1936] 2 All E.R. 515. CA. 42 (1915) 31 T.L.R. 267. CA.

151 *Ford Motor Co. v. Armstrong,* (1915) 31 T.L.R. 267, C.A.

152 *Willson v. Love,* (1896) 1 Q.B. 626, C.A.

153 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) A.C. 79.

154 *Law v. Redditch Local Board,* (1892) 1 Q.B. 127, C.A.

liquidated damages as it was payable upon breach of a single obligation or, as it is often put, upon a single event. Kay L.J. said:

"I cannot agree with the ingenious argument that because there may be many matters, some very small, which would constitute non-completion, these sums may be regarded as payable on several events. According to that argument, there must be considered to be several different non-completions of the works. There may be different causes of non-completion; but non-completion is only one single event."[155]

There are many illustrations of this principle in relation to covenants in restraint of trade. The point was made in the first case establishing that a sum stipulated for breach of such covenants is generally one for liquidated damages, *Crisdee v. Bolton,*[156] where Best C.I. said: "The sum of £500 is to be paid for the doing of one thing only, viz., setting up a victualling house within one mile." Similar statements are to be found in the later cases on restraint of trade covenants.[157] And a very valuable and authoritative statement of the principle is provided in Lord Atkinson's speech in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,*[158] a case of sale of goods in which the buyer had agreed not to resell below certain listed prices. He said:

"The object of the appellants in making this agreement, if

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155 *Sparrow v. Paris* (1862) 7 H. & N. 594.
156 *Crisdee v. Bolton,* (1827) 3 C. & P. 240.
157 *Price v. Green* (1847) 16 M. & W. 346 at *354.*
158 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) A.C. 79.

the substance and reality of the thing and the real nature of the transaction be looked at, would appear to be a single one, namely, to prevent the disorganization of their trading system and the consequent injury to their trade in many directions."

He then pointed out that the parties' object was akin in some respects to that of an employer taking from an employee a covenant in restraint of trade, and continued:

"It is, I think, quite misleading to concentrate one's attention upon the particular act or acts by which, in such cases as this, the rivalry in trade is set up, and the repute acquired by the former employee that he works cheaper and charges less than his old master, and to lose sight of the risk to the latter that old customers, once tempted to leave him, may never return to deal with him, or that business that might otherwise have come to him may be captured by his rival. ... In many cases a person may contract to do or abstain from doing an act, which is a composite act, the product or result of almost numberless other acts. It would be quite illegitimate to ... disintegrate the obligations to do what the parties regarded as a single whole into a number of obligations to do a number of things of varying importance, and treat the [stipulated sum] as prima facie a penalty, because these individual breaches of the agreement did not cause, in many instances, any injury commensurate with that sum."

If, however none of the above methods applies so as to make the stipulated sum payable only on breach of a single obligation, then the case will remain one of a sum payable on breach of several obligations; such cases must

now be considered.

(i) *Where the loss is reasonably calculable at the time of contracting.* If the loss accruing to the plaintiff from anyone of the several possible breaches can, at the time when the contract was made, be accurately or reasonably calculated in money, the fixing of a larger sum will prima facie be treated as a penalty as to all the possible breaches and it is equally immaterial that some or all the other breaches were not so calculable or would involve a greater loss and that it was one of these other breaches that in the event occurred.

This re-introduces the most accurately calculable loss of all, the loss arising from breach of a promise to pay money. If one of the several possible breaches is of this type and the stipulated sum, payable on any breach, is greater than the sum due in performance of the contract, the case is one of penalty. This is well illustrated by the facts of the two cases, which established the whole doctrine, *Astley v. Weldon*[159] and *Kemble v. Farren*[160] In the first an actress was engaged by a theatre manager, who agreed to pay her a weekly salary with travelling expenses if she should perform at his theatre, complying with all its rules and subject to all its fines, and it was further provided that if either should fail to perform the agreement he or she should pay the other £200. In the second an actor was similarly engaged under a contract which provided, *inter alia,* that he should be paid about £3 every night that the theatre was open, and that £1,000 should become payable by either if he failed to perform the agreement, or any part of it, or any stipulation

159 *Astley v. Weldon,* (1801) 2 B. & P. 346.
160 *Kemble v. Farren,* (1829) 6 Bing. 141.

contained in it. In both cases, in a suit brought by the manager for a refusal to appear on the stage, the stipulated sum was held to be a penalty; in the first since an act by the actress in contravention of the theatre rules rendered her liable to a fine and in the second since the manager's neglect to pay the actor for one night's performance would have entailed the entire liability.

As to a breach other than a failure to pay money, there appear to be no cases in which a sum, payable upon breach of several different obligations, has been held to be a penalty on the ground that the loss for one of the possible breaches was reasonably calculable at the time of the making of the contract. This is probably because in most of the cases of this type one of the obligations has been to pay money.

(ii) *Where the loss is not reasonably calculable at the time of contracting.* If on the other hand the loss accruing to the plaintiff from all the several breaches cannot, at the time when the contract was made, be accurately or even reasonably calculated in money, it becomes less easy to class the sum to be paid on breach as extravagant and unconscionable. The principle that where there is difficulty of precise estimation and of proof of the damage the stipulated sum is likely to be liquidated damages operates here as well as with cases where there is only a single breach upon which the sum becomes payable. However, one final rule comes in, in the case of a stipulated sum covering several breaches, which may swing the pendulum away from liquidated damages back to penalty even though there may be difficulty of estimation and proof on all breaches. This rule was definitively stated by Lord Dunedin, once again in *Dunlop Pneumatic Tyre Co. v. New*

Garage and Motor Co.[161] He said:

"There is a presumption (but no more) that it is penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage."

Numerous statements to this effect have appeared in the reports,[162] and the principle is well illustrated in the decisions. In *Ford Motor Co. v. Armstrong*[163] car manufacturers had sold cars to a dealer under an agreement whereby the dealer agreed, first, not to sell the cars under a listed price, secondly, not to sell them to other car dealers, and thirdly, not to exhibit them without the manufacturers' permission, and had further agreed that for every breach he would pay £250. The Court of Appeal held this to be a penalty on the ground that the damage, which would arise under the third clause, was different in kind from that which would arise under the first two. It is submitted that difference in kind between two breaches is not enough to make the stipulated sum a penalty unless there is also a substantial difference in the amount of the probable loss arising from each breach, a requirement which would seem to have been satisfied on the facts of *Ford Motor Co. v. Armstrong.* In *Willson v. Love*[164] the lessees of a farm had covenanted not to sell hay or straw

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161 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* [1915] A.C. 79 at 87

162 *Boys v. Ancell* (1839) 5 Bing.N.C. 390 at 396; *Elphinstone v. Monkland Iron and Coal Co,* (1886) 11 App.Cas. 332 at 343, *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.* [1915] A.C. 79; *Betts v. Burch* (1859) 4 H. & N. 506 at 511, *Magee v. Lavell* (1874) L.R. 9 C.P. 107 at 115.

163 *Ford Motor Co. v. Armstrong,* (1915) 31 T.L.R. 267, C.A.

164 *Willson v. Love,* [1896] 1 Q.B. 626.

off the premises during the last year of the term but to consume it on the premises and to pay, as additional rent, £3 for every ton of hay or straw so sold. This was held to be a penalty because payable upon two different events, the sale of hay and the sale of straw, there being a substantial difference between the manurial value of the two commodities.[165]

In *Boys v. Ancell*[166] the defendant had agreed to grant a lease to the plaintiff in consideration of the plaintiff's promise to execute the counterpart and to pay the expenses, and each party had bound himself to pay £500 should he be in breach. In holding this a penalty Coltman J. pointed out that "the sum specified here is applicable equally to the refusal to grant a lease, and the omission to pay the expenses of it".

In *Magee v. Lavell*[167] the plaintiff sold his tenancy in a public house to the defendant together with the goodwill, with the provision for the payment of £1 00 "if either party shall refuse or neglect to perform all or every part of this agreement". This was held to be a penalty,[168] Coleridge J. saying that it involved "several events of various degrees of importance".[169] Indeed the most frequent illustration of this category is to be found in cases concerning the sale or lease of land and businesses where the stipulated sum,

which has been held to be a penalty, was to become

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165 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.* [1915] A.C. 79 .
166 *Boys v. Ancell,* (1839) 5 Bing. N.C. 390.
167 *Magee v. Lavell,* (1874) L.R. 9 C.P. 107.
168 *Davies v. Penton,* (1827) 6 B. & C. *216.*
169 (1874) L.R. 9 C.P. 107 at 115.

payable if either party did not comply with each and every part of the contract.[170]

However, the tendency of the courts in the most modern cases has been to enclose this final rule within reasonable bounds and to assert that variety in the possible losses does not necessarily preclude a proper.

The first method is to be found in *Dunlop* provision for liquidated damages. This has been done in two related ways: either by holding that the probable loss following on all the breaches is so uncertain that it is equally uncertain that the loss from one breach would be greater or less than that from the next, or by holding that the provision is a sort of averaging out of the probable loss to be sustained from all the breaches, provided always there is not too great a disparity between the greatest possible loss and the smallest possible loss.

Pneumatic Tyre Co. v. New Garage and Motor Co.[171] Lord Atkinson there said that:

"although it may be true ... that a presumption is raised in favour of a penalty where a single lump sum is to be paid by way of compensation in respect of many different events, some occasioning serious, some trifling damage, it seems to be that the presumption is rebutted by the very fact that the damage caused by each and everyone of those events, however varying in importance, may be of

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170 *Betts v. Burch* (1859) 4 H. & N. 506; *Bradley v. Walsh* (1903) 88 L.T. 737; *Lock v. Bell* [1931J 1 Ch. 35; *Michel Habib v. Sheikh Suleiman* [1941] 1 All E.R. 507. P.C. *Astley v. Weldon* (1801) 2 B. & P. 346; *Kemble v. Farren* (1829) 6 Bing. 141.

171 *Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) A.C. 79.

such an uncertain nature that it cannot be accurately ascertained."

The same idea had been put in more concrete form much earlier by Alderson B. in *Galsworthy v. Strutt,*:[172]

"The act of damage ... by another's practising within 50 miles for the period of seven years, would not be the same in amount as if he were to practise within 40 miles, or next door, nor the same if he had set up in business in the first, second, or sixth year, but the parties have agreed to a certain fixed sum, in order to prevent the necessity of being at the expense of procuring the attendance of witnesses for the purpose of giving evidence upon those matters."

This method is more likely to prove efficacious if the probable damage varies in degree, and not also in kind, with each breach, a point put forward by Lord Parker of Waddington in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*,[173] and acted upon by the Court of Appeal in and the breach of another in loss between £2 and £12, the parties have, therefore, settled on £8 as liquidated damages. Here the stipulated sum is explicitly calculated as a mean figure. Similarly, Scrutton L.J. in English Hop *Growers v. Dering,*[174] considered it to be reasonable that "damages of the same kind, but difficult to value exactly, may be averaged".[175]

The application of these two methods has assisted in the

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172 *Galsworthy v. Strutt,* (1948) 1 Ex. 659.

173 *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.,* (1915) A.C. 79 at 98.

174 *Growers v. Dering,* (1928) 2 K.B. 174, C.A. at 182.

175 *cf Robophone Facilities v. Blank* (1966] 1 W.L.R. 1428, CA, at 1449.

upholding of sums as liquidated damages in several modern decisions, although the situation has generally been a hybrid one in which the same result has been reached also on the alternative, but related, ground that the stipulated sum was payable only on breach of a single stipulation. *Dunlop Pneumatic Tyre Co. v. New Garages and Motor Co.*[176] provides, once again, the most useful illustration.[177] In connection with these two routes for the upholding of stipulated sums as liquidated damages the authoritative, and contemporary, remarks of Lord Woolf in *Philips Hong Kong v. Attorney-General of Hong Kong*[178] are particularly valuable. He there said:

"There is always going to be a variety of different situations in which damage can occur and even though long and detailed provisions are contained in a contract it will often be virtually impossible to anticipate accurately and provide for all the possible scenarios. Whatever the degree of care exercised by the draftsman it will still be almost inevitable that an ingenious argument can be developed for saying that in a particular hypothetical situation a substantially higher sum will be recovered than would be recoverable if the plaintiff was required to prove his actual loss in that situation. Such a result would undermine the whole purpose of parties to a contract being able to agree beforehand what damages are to be recoverable in the event of a breach of contract. This would not be in the interest of either of the parties to the contract."

10.11 RULES FOR DISTINGUISHING LIQUIDATED DAMAGES AND PENALTY IN INDIA:

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176 *Dunlop Pneumatic Tyre Co. v. New Garages and Motor Co.,* (1915] AC 79.

177 *Wallis v. Smith* (1882) 21 Ch.D. 243.

178 *Philips Hong Kong v. Attorney-General of Hong Kong,* (1993) 61 B.L.R. 41, P.C.

The criterion whether a sum described as "penalty" or "liquidated damages" is truly liquidated damages, and, therefore, not to be interfered with by a Court, or a penalty which covers, but does not assess the damages, is the ascertainment or whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation, or is a sum liable to fluctuation in amount according to circumstances.[179] From the very nature of things it is impossible to give a general rule applicable to all cases. Much depends upon the circumstances of each particular case and upon the question whether the sum stipulated to be payable is one that is fair and not unconscionable.[180] If there is a large disparity between the sum mentioned and the amount of the probable loss, the stipulation may be taken to be by way of penalty, while if it is approximate to the real loss, it will point towards its being liquidated damages. But the mere largeness of the amount fixed will not, however, by itself, conclude the matter.[181] The question must always be whether the construction contended for renders the agreement unconscionable or extravagant, and one which no Court ought to allow to be enforced; and where it is impossible, when making a contract, to foresee the extent of the injury which might be sustained in case of a breach, and the damages, though very real, are difficult of proof, which on the other hand, is likely to entail considerable

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179 *Public Works Commissioners v. Hills,* (1906) A.C. 368: 75 L.J.C.P. 69; *Kanak Kumar! v. Chandan Lal,* AIR 1955 Pat. 215 at p. 222; *Tarachand v. Chandigram,*. (1961) Jab. L.J. 141 : 1960 M.P.L.J. 1379.

180 *Clydebank Engineering and Shipbuilding Co. Ltd., v. Yzquierdo.*, (1905) A.C. 6 : 14 L.J .P.C.

181 *Astley v. Weldon*. (1801) 2B. & P. 346; *Herbert v. Salibury Yeovil Rly. Co.* (1866) L.R. 2 Eq. 224.

expense and the parties have agreed upon a reasonable sum to be paid as liquidated damages in case of breach, the Court will not lean towards its being a penalty.[182]

Therefore, if the plaintiff succeeds in establishing that the sum named in the agreement is a genuine pre-estimate of damages, or would otherwise be a reasonable compensation for the breach, the Court may grant the entire sum named in the breach as such compensation. If, on the other hand, the Court comes to the conclusion that the amount as fixed was in terrorem or unconscionable and extravagant, it would be open to it to award such sum as may appear to be reasonable.[183]

- **Rules for determining the question:**

Upon the language of the decided cases certain rules have been framed which may afford assistance in determining the true intention of parties:[184]

(1) where a contract provides that, upon the non-payment of a certain sum of money, larger sum shall thereupon become forth with payable, the ,latter is always deemed to be a penalty;

(2) where a contract contains a condition for payment of a sum of money to secure the performance of several stipulations of varying degrees of importance, and for breach of some of which the damages might be deemed to

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182 *Webster v. Bosanaquet.* 16 I.C. 147: (1912) A.C. 394.

183 *Badhava Singh v. Charan Singh,* AIR 1955 Raj. 87 at p. 90 : 1955 Raj L.W. 174: I.L.R. (1954) Raj. 755; *Union of India v. Vasudeo Agarwal,* AIR 1961 Pat. 87.

184 Vide Arnold, *Damages,* 2nd Edn., p. 27; Mayne, *Damages,* 10th Edn., p. 136.

be liquidated but for others unliquidated, such a sum is, *prima facie*, a penalty and not liquidated damages;

(3) where the damage resulting from breach of contract is altogether uncertain, especially if only a single breach is specified and yet a definite sum of money, reasonable in amount is expressly made payable in respect of it. Such provision is not in the nature of a penalty, but liquidated damages; and

(4) where a single lump sum is to be paid by way of compensation in respect of many different events, some occasioning serious, some trifling, damage, and the damage caused by each and every one of these events, however varying in importance, is of such an uncertain nature that it cannot be accurately ascertained, it is, again, not a penalty, but liquidated damages.

- **First Rule: Payment larger than debt:**

The first rule is stated to be an exception to the general rules that where parties have agreed that in the event of one of them failing to keep the contract. he shall pay a specific sum as damages to the other, such sum is to be regarded as liquidated damages. As observed by Lord Esher, "One recognized exception to such rule is, where a sum of money is to be payable upon the non-payment of a smaller specified sum, in this case the Courts have treated the larger sum as a penalty, not as liquidated damages".[185] In fact as Tindal, C.J., said "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should

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[185] *Law v. Redditch Local Board,* (1892) 1 Q.B. 127: 61 L.J.Q.B. 172: *Astley v. Weldon,* (1801) 2 B. & P. 346.

not be considered a penalty, appears to be a contradiction in terms".[186]

In Astley v. Weldon,[187] articles of agreement were entered into between the plaintiff and the defendant by which it was agreed on the part of the former that he should pay the latter so much per week together with travelling expenses, and on the part of the defendant that he should perform at his theatres and comply with all the rules and regulations specified and be subject to such fines as are established, and that in the event of breach the one should pay to the other, a sum of £ 200. On the defendant refusing to perform, the plaintiff brought the action for recovery of £ 200, but it was held that, being in the nature of a penalty plaintiff could not recover for, if he were allowed to do so, it would be allowing him to recover this large sum of £ 200 for refusing to pay a trifling fine, or failing to perform some other act which would be punishable by a fine. In *Thompson v. Hudson*[188] the leading case on the subject, the defendant was indebted to the plaintiff on several accounts to ascertain which three separate suits were pending against him. In one suit a final decree was made fixing the liability on one account and directing the amount to be paid on a certain day. When the defendant wanted further time for payment, it was agreed between the parties that the terms of the order as to payment should be varied on the defendant's agreeing not to appeal against the final decree already made, to admit the amounts claimed in the other two suits, and on a certain day to pay a fixed sum and to execute a mortgage, for securing payment in a certain manner of

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186 *Kemble v. Farren*, (1889) 6 Bing. 141 at p.148.
187 *Astley v. Weldon,* (1801) 2 B. & P. 346.
188 *Thompson v. Hudson,* (1869) L.R. 4 H.L. 1.

another sum. The plaintiffs also agreed, on their part, to take a lesser sum than they claimed with a proviso that, if the defendant made any default, they should be at liberty to recover their whole debt.

Lord Westbury observed: "If the sum described as liquidated damages be a large sum, and the title to that sum is to arise upon some very trifling consideration, then it follows plainly that the larger sum named never could have been meant to be the real measure of the damages. It was an oppressive agreement. The sum named could never have been the proper amount of damages arising out of the non-observance of some of the stipulations of that agreement, which probably would have been measured by a few shillings, and, therefore, the very large sum stated to be damages was properly regarded as in the nature of a penalty."

Lord Hatherly in the same case stated in the rule is much broader terms: "Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage, or be it by way of stipulation that in case of its not being paid at the time appointed, a large sum shall become payable and be paid, in either of those cases equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any other augmentation for the debt as a penal provision on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate, as in the nature of a penal provision, against which equity will relieve when the object in view, namely, the securing of the debt is attained; and regarding also the stipulation for the payment of a large sum of money if the sum be not paid at

the time it is due, as a penalty and a forfeiture against which equity will relieve."

These cases definitely show that it is a settled law, that where an ascertained definite sum of a less amount is to be paid at a certain day, in default of which a large sum is to be paid, the Court will treat the latter as a penalty.

- **Converse case where debt is large, but payment smaller:**

But the rule is otherwise in the converse case where under a contract a larger sum is the full amount of the debt originally intended by the parties and becomes payable forthwith, but the creditor agrees to receive a smaller sum, if it be paid on a certain day if secured in a certain way, such a provision is not a penalty.[189] The agreement to take the smaller sum if paid punctually is intended for the benefit of the debtor, and in no way militates against the right of the creditor to claim the larger sum on default.

On the same principle where a bond stipulates for the payment of debt in instalments with a provision that, in default of paying anyone of the instalments punctually, the whole of the debt shall become forthwith payable, the provision for the payment of the whole debt does not constitute a penalty.[190]

- **Second Rule: Lump sum to secure**

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189 *Astley v. Weldon.* (1801) 2B. & P. 346; *Thompson v. Hudson.* (1869) 4 H.L. 1.

190 *Protector Loan Co. v. Grice,* (1880) 5 Q.B.D. 592; *Willingford v. Mutual Society,* (1880) 5 App. Cas. 685; *Sterne v. Beck.* (1863) 32 L.J. Ch. 682.

performance of several stipulations:

The second rule is framed on the principle that if a stipulation is to be treated as a penalty in respect of one or more events it must be considered a penalty in respect of all. There are a large number of cases in which this rule has been upheld, and broadly stated. It amounts to this; that where articles contain covenants for the performance of several things and then one large sum is stated at the end to be paid upon the breach of performance that must be considered as a penalty.[191] Accordingly it has been held that where a sum of money is made payable by contract to secure the performance of several stipulations the damages for the breach of which respectively must be substantially different, or in other words, the performance of stipulations of varying degrees of importance, the sum is *prima facie* to be regarded as a penalty.[192] Bayley, J stated the rule to be, that where the sum which is to be security for the performance of an agreement to do several acts, will, in cases of breaches of the agreement, be in some instances too large, and in others too small, a compensation for the injury thereby occasioned, that sum is to be considered a penalty.[193]

In *Ford Motor London Co. Ltd. v. Armstrong,*[194] the agreement between the plaintiff and defendant provided that the plaintiffs should sell their motor cars, to the defendant, for sale by him within a certain district, the defendant undertaking not to sell any car or parts below a certain price and to pay the plaintiffs a some of £ 250 for

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191 *Astley v. Weldon,* (1801) 2 B. & P. 346.
192 *Wilson v. Love*. (1896) 1 Q.B. 626 : 65 L.J. Q.B. 474.
193 *Davies v. Penton.* (1827)6B. & C. 216; 5 L.J.O.S.K.B. 112.
194 *Ford Motor London Co. Ltd. v. Armstrong,* (1915) 31 T.L.R. 267.

every breach of such undertaking, the sum being expressed to "the agreed damages which the manufacturer will sustain". The defendant having sold the cars at a lower price than that fixed, the plaintiffs brought an action for the recovery of the sum of £ 250. But it was held that the agreed sum was a penalty and not liquidated damages, inasmuch as breaches of the different conditions in the agreement would result in damages largely varying in amount and, therefore, the sum of £ 250 was not a fair pre-estimate of the probable damage. In *Kemble v. Farran,*[195] the facts are almost similar to those in *Astley v. Weldon,*[196] The defendant, a comic actor, engaged himself to act at the plaintiffs theatre, for four seasons and abide by the rules of the theatre. The plaintiff on his part, agreed among other stipulations to pay the defendant the sum of £3.6s.9d., every night the theatre was not open. If either party should fail to fulfill the agreement in whole or in part, or any of its stipulations, he should pay to the other sum of £ 1,000 which was stipulated to be the agreed sum of damages sustained by reason of the breach. The Court held that the sum of £ 1,000, named in the contract was a penalty and not liquidated damages, and laid down the rule that where an agreement contains several stipulations of varied degrees of importance and value, a sum agreed to be paid by way of damages for the breach of any of them shall be construed as a penalty, and not as liquidated damages, even though the parties have in express terms stated the contrary. This rule was followed in *Homer v. Flintoff.*[197]

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195 *Kemble v. Farran,* (1829) 6 Bing. 141.
196 *Astley v. Weldon,* (1801) 2 B. & P. 346.
197 *Homer v. Flintoff,* (1842) 9M. & W. 678: 11 L.J. Ex. 270.

In *Magee v. Lavel,*[198] where the plaintiff entered into an agreement for the transfer of his tenancy in a public house and the sale of the goodwill thereof to the defendant, and the agreement contained a variety of stipulations with regard to the transfer of the licences, the payment of rates and taxes, purchases of the fixtures, furniture and stock and a provision that if either party shall refuse or neglect to perform all and every part of the agreement, he shall pay to the other the sum of £ 100 damages it was held that the stipulated sum of £ 100 was not liquidated damages but a penalty.

In all such cases where a lump sum is made payable by way of compensation on the occurrence of one or more of all of several events, some of which may occasion serious and other trifling damages, presumption has been held to arise that the parties intended the sum to be penal.[199]

- **Third Rule - Reasonable sum to secure performance of single stipulation:**

Under the third rule stated above, it is to be noted that, if there be only one event upon which the money was to become payable and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation in order to avoid the difficulty.[200] So on a guarantee that a certain vessel should sail with or before another vessel then in the berth, "under penalty of forfeiting one- half of the freight", another vessel having sailed first, it was held, that one-half of the freight could

198 *Magee v. Lavel,* (1874) L.R. 9 C.P. 107 : 43 L.J. C.P. 131.
199 *Elphinstone (Lord) v. Monkland Iron & Coal Co.,* (1886) 11 A.C. 332.
200 *Sainter v. Ferguson,* (1849) C.B. & 716 : 18 L.J.C.P. 217.

be recovered as liquidated damages, as it was immaterial that the money intended to be payable was called was a "penalty".[201] Again, where the defendant agreed to take an assignment of the plaintiffs house and premises, without requiring the lessor's title; that he would pay £ 2,300 for it and take possession on or before a certain day, and the plaintiff on his part, also agreed to deliver possession, and do some specified things necessary to maintain the defendant in possession, and there was a provision that either party, not fulfilling all and every part of the agreement, was to pay to the other a sum of £ 500 thereby settled and fixed as liquidated damages, it was held that on breach of the agreement by omission to take the assignment, the defendant was liable to pay the whole sum of £ 500.[202]

It would seem that the forfeiture of the amount of deposit made by a purchaser in case of a sale, on his default to perform the contract, falls under this rule and in some cases the vendor has been held entitled to retain the deposit amount even though he suffered on actual damages.[203]

In *Law v. Redditch Local Board,*[204] there was a contract for the construction of sewage works, which provided that the works should be completed in all respects by a specified date, and that in default of such completion, the contractor should forfeit and pay the sum of £ 100 and £ 5 for every seven days during which the works should be incomplete

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201 *Sparrow v. Paris,* (1862) 7 H. & N. 594.

202 *Relly v. Jones,* (1823) 1 Bing., 302 : 1 L.J. O.S. C.P. 105.

203 *Hinton v. Sparkes,* (1868) L.R. 3 C.P. 161 : 37 L.J.C.P. 81 : *Lea v. Whitaker,* (1872) L.R. 8 C.P. 70 : 27 L.T. 676.

204 *Law v. Redditch Local Board,* (1892) 1 Q.B. 127: 61 L.J.Q.B. 172.

after the said date, as and for liquidated damages. On the failure to complete the works according to agreement it was held that the plaintiffs were entitled to recover, inasmuch as the sums agreed to be paid were payable on a single event only, viz. the non-completion of the works and they must, therefore, be regarded as liquidated damages and not penalties.

- **Fourth Rule- Several breaches, damages uncertain:**

The fourth rule may be taken to be an extension of the principle contained in the third. If instead of a single event breach of which has been provided for by the payment of a sum of money on the essential ground that the consequential injury cannot be estimated in money, the same result will have to follow even though there are several events breach of which cannot similarly be measured in money. Thus although a presumption is said to arise in favour of a penalty where a single lump sum is to be paid by way of compensation in respect of many different events, some occasioning serious, some trifling damage,[205] that presumption may be rebutted by the fact, the damage caused by each and every one of those events, however, varying in importance, is of such an uncertain nature that it cannot be actually ascertained. As Alderson. B., said: "When the damage cannot be ascertained, what absurdity is there in a party saying there shall be a fixed sum, and therefore, in such a case the Courts may give the words their plain and ordinary meaning."[206] In a recent case,[207] Lord Dunedin in

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205 *Elphinstone (Lord) v. Monkland Iron & Coal Co ,* (1886) 11 App. Cas. 332.

206 *Galsworthy v. Strutt,* (1848) 1 Ex. 659 : 17 L.J. Ex. 226.

explaining the rule stated that where a single sum as agreed to be paid as liquidated damages on the breach of a number of stipulation of varying importance, and the damage is the same kind for every possible breach, and is incapable of being precisely ascertained the stipulated sum, provided it be a fair pre-estimate of the probable damage, and not unconscionable, will be regarded as liquidated damages and not as a penalty.

This rule is frequently applied in cases of agreements "in permissible restraint of trade" as between surgeons, and other professional people, where one partner binds himself to pay, on retirement, a sum of money to the other partner in the event of his committing a breach of the conditions and stipulations contained in the agreement.[208]

➢ **Whether intention always allowed to prevail:**

It may be conceded that the foregoing rules are, at best, only guides to determine the true intention of the parties, and are more or less artificial in their nature. If as it is supposed, they enable the Court to arrive at the intention of the parties, would it, in all cases allow the intention to prevail and if it is clear fix them to the very letter of their contract, however unreasonable and exorbitant the stipulations may be. In one case, *Wallisv. Smith,*[209] which is frequently quoted, Jessel, M.R. expressed himself strongly against interfering with the stipulation of the

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207 *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. Lid ..* (1915) A.C. 79 : 83 L.J.K.B. 1574.

208 *Price v. Green,* (1847) 15 M & w. 346: 16 L.J. Ex. 108: *Atkins v. Kinnier,* (1850)4 Ex. 776: 19 L.J. Ex. 132: *Galsworthy v. Strutt,* (1848) 1 Ex. 659 : 17 L.J. Ex 226: *Reynold3 v. Bridge,* (1856) 6 E. & B. 528.

209 *Wallisv. Smith,* (1882) 21 Ch. D. 243: 52 L.J. Ch. 145.

parties. He said: "Courts of law should maintain the performance of contracts according to the intention of the parties. They should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves."[210] Cotton. L.J. was also of the same opinion. In that case, the plaintiff had entered into a contract with the defendant. a builder to sell him an estate for £ 70,000 which was to be expended by the defendant in building on the estate. The contract contained various provisions, and, amongst others, it was agreed that the defendant should deposit a sum of £ 5,000 with certain bankers to the joint account of himself and the plaintiff £ 500, to be paid on the execution of the contract and the remainder within seven months there from. If the plaintiff could not make a good title the deposit of £ 500 was to be returned and he was to pay to the defendant a sum of £ 5,000 as liquidated damages. If the defendant should commit a substantial breach of the contract either by not prosecuting the work with due diligence, or by failing to perform any other provisions of the contract, then and in either of such events, the deposit of £ 5,000 should be forfeited, and if it had not been paid the defendant should forfeit and pay to the plaintiff £ 5,000 by way of liquidated damages, and the agreement should become void and of no effect and the plaintiff should regain possession of the estate. The defendant having failed to pay the sum of £ 500, and also having altogether failed to carry out the contract, the plaintiff brought an action for recovery of the £ 5,000 as liquidated damages. The Court of Appeal held affirming the decision of Fry. J, that he was entitled to recover. But the opinion of Lindley, L.J., however, has not the sweeping effect, which the

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210 *Wallis v. Smith.* (1882)21 Ch. D. 243 at p. 266: 52 L.J. Ch. 145.

language of Jessel, M.R., would seem to indicate. Lindley. L.J., said,[211] "Now the authorities have been carefully examined by the Master of the Rolls, and there are only one or two to which I will advert, but they all seem to proceed on the principle that the object is to ascertain the intention of the parties. You are to ascertain the intention of the parties by what they said, that is plain enough, but you are to ascertain the intention of the parties not only by what they said but what the Court sees to be the consequence, and by what the Court mayor may not consider it to be absurd or oppressive, or thought to be so in former times. Take the common case of a money bond. It meant what it said: Take the ordinary case of a covenant to pay £ 5,000 if £ 500 was not paid by the day named, the parties meant what they said; but effect has long ceased to be given to what was intended. Whether relief was given on the theory of oppression, or on the theory that parties could not have meant what they said-that it was too absurd-or whether relief was given by reason of the usury laws. I do not know-it is an antiquarian research which I have not pursued. But it has long been settled that where a person agreed to pay a larger sum if he does not pay a small one, he does not mean what he says, and the contract is not to have effect that one would suppose it was intended to have."

From an examination of the foregoing authorities it will be seen that in some cases the parties are bound by the true letter of their agreement which was given effect to, while in others it was inferred that they themselves did not contemplate being bound by it and that they did not mean what they said. As pointed out in Pollock and Mulla Indian

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211 *Wallis v. Smith,* (1882) 21 Ch.D. 243 at p. 270 : 52 L.J. Ch. 145 at pp. 274. 275.

Contract Act[212]: ''The nearest approximation to a general test yet arrived at is that so-called liquidated damages will not be recoverable in full when the Court thinks this would be extravagant or unreasonable having regard to circumstances of the particular case." You are to consider whether it is extravagant, or unconscionable at the time when the stipulation is made, that is to say, in regard to any possible amount of damages or any kind of damage, which may be conceived to have been within the contemplation of the parties when they made the contract.[213]

- **Indian Law:**

In India, however, the distinction between penalty and liquidated damages has been fortunately done away with by a bold stroke of the Legislature, which relieved the Courts in this country of solving the many difficult questions which the distinction has given rise to.[214] Section 74 of the Indian Contract Act makes provision for payment of compensation in all cases in which the parties named a sum in the contract amount to be paid in case of a breach thereof, irrespective of the question whether the sum named is treated as a penalty or liquidated damages.

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212 Pollock and Mulla, *Indian Contract Act*, Sixth Edn., p. 435.

213 *Clydebank Engineering and Shipbuilding Co. Ltd .. v. Yzquierdo,* (1905) A.C. 6 : 74 L.J. P.C. 1.

214 *Mackintosh v. Crow,* I.L.R. 9 Cal. 692; *Brahmaputra Tea Co. v. Scarth,* I.L.R. 11 Cal. 550; *Deno Nath v. Nibaran*, I.L.R. 27 Cal. 423; *Vengideswara Puttar v. Chatu Ache*:1, I.L.R. 3 Mad. 224; *Nait Ram v. Shib Dat*, I.L.R. 5 All 238; *Union of India v. Vasudeo Agarwal*, A.I.R. 1960 Pat. 87 p. 92.

➢ **Meaning of penalty:**

The word "penalty" used in Sec. 74 has nowhere been defined in the Indian Contract Act. But it may be taken to have been used in the sense of a secondary stipulation, which provides for the payment of an additional burden on default.[215] Used in this sense it may be taken to have been intended to bear its ordinary common sense meaning, when used in relation to contract, namely, a liability agreed by the parties to be imposed as a vindictive punishment on the party committing the breach of contract, and not merely as reasonable and even as liberal compensation to the other side injured by the breach.[216] In this view of its meaning it must be a matter of extreme regret if a Court of equity would allow itself to be made the medium for enforcing terms that may be revolting to every sense of justice. Speaking in relation to a case,[217] in which an exorbitant rate of interest was claimed, Straight, J., said that if Courts are always bound by the agreement between the parties as to interest, "it would be impossible to say to what extravagant and extortionate extent the most usurious claims under the name of 'interest' might not be carried". These remarks will apply with an equal degree of force in respect of any other provision in the nature of a penalty stipulated in a contract."

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215 *Ramakrtshnayya v. Venkata Somazulu,* AIR 1934 Mad. 31 at p. 36 [F.B.].

216 *Muthukrtshnan v. Shankaralingam Pillai,* 18LC. 414 at p. 421: *Sukul Sowcar v. Tirumala Rao,* 51 I.C. 295; *Seetaramayya v. Kotayya,* 35 I.C. Ill.

217 *Bansidar v. Bu Alikhan,* I.L.R. 3 All. 260 at p. 265 (F.B.).

➢ **Payment of higher interest included:**

The result of the amendment of the section in 1899 has been to bring within the scope of the equitable jurisdiction of the Courts all stipulations in a contract, which is in the nature of a penalty, including stipulations for payment of interest in case of failure to pay a debt on the due date. The addition of the four new Illustrations (d) to (g) clearly indicate the intention of the Legislature that Courts should not take too narrow a view of the meaning of the word "penalty" based on English precedents, but might hold certain provisions for payment of interest even from the date of default, to be provisions by way of penalty.

➢ **Test to determine:**

Whether any provision in a contract is a penalty or not? is of course, for the Court to determine. The use of the word "penalty" is not necessary, nor would its use necessarily govern the construction to be put by the Court upon the terms of the contract. The test as pointed out in several cases, and notably by Lord Lindley in *Wallis v. Smith,*[218] is whether the stipulation is so oppressive, unjust and unreasonable as to make the Court hold that it ought not be enforced equity. If the Court finds the provisions unreasonable and unjust, it holds by a fiction that the parties did not intend that it should be carried out. The real test is the Court's opinion regarding the justice and propriety of the provision.[219] As pointed out by Lord

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218 *Wallis v. Smith,* (1882) 21 Ch.D. 243.

219 *Muthukrishnan v. Shankaralingam Pillai,* 18 I.C. 414 at p. 438; *Bhimji N. Dalal v. Bombay Trust Corporation,* AIR 1930 Born. 306 at p. 315.

Loreburn (Lord Chancellor) in *Samuel v. Newbold,*[220] "If there is evidence which satisfies the Court that the transaction is hard and unconscionable, using these words in a plain and not in any technical sense, the Court may reopen it, provided, of course, that the case meets the other conditions required. A transaction may fall within this description in many ways. It may do so because of the borrower's excessive necessity and helplessness, or because of the relation in which he stands to the lender, or because of his situation in other ways. These are only illustrations and. as in the case of fraud; it is neither practicable nor expedient to attempt any exhaustive definition. What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice, the transaction was harsh and unconscionable."

"The question must always be whether the construction contended for renders the agreement unconscionable or extravagant and one which no Court ought to allow to be enforced. No abstract rule can be laid down as to what may, or, may not be extravagant or unconscionable, without reference to the particular facts and circumstances which are established in each particular case." But, however, improvident a transaction may be. it is difficult for a Court of Justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money-lender had unduly taken an advantage of his position.[221]

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220 *Samuel v. Newbold,* (1906) A.C. 461 : 75 L.J. Ch. 705; *Muthukrishnan v. Shankaralingam Pillai,* 18 I.C. 414 and *Challabhroo v. Banga Behari Sen*, 31 I.C. 394; *Samuel v. Newbold*.

221 *Aziz Khan v.Dunichand,* 48 I.C. 933 (P.C.).

The whole principle of the law of penalty as explained by Srinivasa Iyengar, J., is this: If in making provision for breach of contract the promise stipulates from the promisor on the breach only for such compensation as the Court would deem reasonable in the circumstances. Then there is no penalty and the stipulation is not penal. But if on the other hand the Court would on a proper consideration come to the conclusion that the stipulation was put in not only by way of reasonable compensation to the promisee. But in order that by reason of its burdensome or oppressive character it may operate in terrorem over the promisor so as to drive him to fulfill the contract, then the stipulation is one by way of penalty.[222]

- **Whether a clause in a contract is penal to be judged at the time of making of contract:**

The question whether a particular clause in a contract is a penal clause is a question of construction to be decided upon the terms and inherent circumstances of each particular contract judged of at the time of the making of the contract not as at the time of the breach.[223] The law is settled that the question has to be decided on the basis of the circumstances obtaining at the time the contract was made.[224]

- **Four distinctive features:**

The section has four distinctive features, which have to be borne in mind:

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222 *Ramalinga v. Meenakshi Sundaram,* AIR 1925 Mad. 177.

223 Chitty, *Contracts.* (1492), 23rd Edn.. Vol. I. and *Public Works Commissioner v. Hills*. (1906) A.C. 368 at p. 376 and *Webster v. Bosanquet.* (1912) A.C. 394.

224 *Nonjibhai Karansanji v. Ramkishan Sunderlalji.* (1976) M.P.L.J. 650 at p. 653.

(1) Every stipulation contained in a contract whether it be for payment of a sun named or compensation in any other form which is to come into operation up or the breach is to be treated as a penalty;

(2) The party complaining of the breach is entitled to recover only a reasonable compensation and not the full compensation stipulated to be paid;

(3) Such reasonable compensation should in no event exceed the original expectations of the parties; and

(4) Such reasonable compensation is recoverable even though actual loss or damage has not been sustained from the breach.

Accordingly, where upon a consideration of all the circumstances of the case the Court finds that the terms, which were intended to come into operation on a breach of the contract, are in the nature of a penalty within the meaning of the section or in other words they are harsh, unjust and unreasonable. It ought to refuse to enforce them and proceed to assess the damages at a sum, which is reasonable under the circumstances. The stipulations of the parties only afford the maximum to be allowed but much less may be given.

- **Penalty by way of conveying property:**

The stipulation contained in a bond that the debtor would sell his property in default of repayment of the loan within the time fixed, is penal and the Court can relieve him of it.

In a contract the parties may provide for the consequences of its breach. If the stipulation put is not by way of reasonable compensation to the promise, but, by reason of its burdensome or suppressive character, operates in terrorem over the promisor so as to drive him to perform his part of the contract, such a stipulation is a penalty. The essence of a penalty is a stipulation in terroremofthe offending party. A stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it. The Court awards to the aggrieved party only reasonable compensation. However, the penalty clause does not deprive the aggrieved party of his right to damages that can be estimated. Pointing out the distinction between the English common law and our Contract Act in *Fateh Chand v. Balkishan Dass,*[225] their Lordships have laid down as follows:

"The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amount to be paid in case of breach and stipulations by way of penalty."

A penal provision contained in a contract is not restricted to money for enhanced rate of interest but is wide enough to include a stipulation to convey immovable property on default of payment of a debt on the fixed date. In the case of a loan, the debtor is bound to repay it to the creditor together with the interest agreed upon but the stipulation that the debtor will convey his immovable property to the creditor. In case he does not repay the loan within the time fixed for its repayment is necessarily in *terrorem* of the

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225 *Fateh Chand v. Balkishan Dass,* AIR 1963 S.C. 1405.

debtor to drive him to repay the loan within the stipulated time. Therefore where a creditor seeks to enforce that penalty the Court will relieve the debtor from it and. instead, award reasonable compensation to the creditor. This view finds support in *Phoolchand v. Punaram*[226] The expression "any other stipulation by way of penalty" has been held not only to include stipulations for payment of a sum of money or for payment of interest, but also all other kinds of stipulations which are penal in their nature. Thus a stipulation to convey a house or other property on default of payment of a debt is a stipulation by way of penalty, and the Court is empowered under the section to give by way of recompense all that can be reasonably expected or desired.[227] The Court should not omit to notice the provision in the security bond for a. deposit of thrice the value of the goods on default of the production because it is clearly in nature of a penalty and inserted in terrorism In such cases the Court has undoubted powers, in the exercise of its equitable jurisdiction to relieve the party and confine his liability to the extent of a reasonable compensation to the other side not exceeding the penalty stipulated for.[228]

But in *Rajagopala Padayachiv Varadaraja Pandachi,*[229] the appellant was one of three brothers and at the time of partition it was agreed that instead of taking his share of

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226 *Phoolchand v. Punaram,* 1963 M.P.L.J. Note No. 84; *Raja of Ramnad v. Sellachami Tewar,* AIR 1917 Mad 405 and *Mahadeo Baksh Singh v. Sant Baksh,* AIR 1920 Oudh 180; *Manaklal Bhagchand Sahu v. Bhagwandas Hiralal Chaurasia*, 1968 M.P.L.J. 806 at pp. 807-808.

227 *Bana Bhai v. Chandrabhavy,* AIR 1931 Nag 60 at p. 63; *Fulchand v. Pularam,* 1963 M.P. L.J. (Notes) 84.

228 *KP. Ambady v. K.M. Balan,* AIR 1959 Ker. 273 at pp. 274. 275; 1958 Ker. L.T. 801.

229 *Rajagopala Padayachiv Varadaraja Pandachi,* AIR 1925 Mad. 84 at pp. 84. 85: 47 M.L.J. 605.

the land. He should receive an annuity in moieties from his two brothers and if either defaulted he should resume that portion of his share, which had gone to the defaulter. It was held that if the contracting parties were merely remitted to their original positions there could be no question of penalty. A return to the status quo at the time when the agreement was entered into does not vest the property in the respondent. So he cannot be said to forfeit what at that time was not his.

So, also a clause in a mortgage of movables entailing forfeiture of the right of redemption on failure to perform certain conditions was held to be unenforceable.[230] But it cannot be said that a forfeiture clause in the Articles of Association of a company by which the company could declare the shares of a person forfeited in certain contingencies is in the nature of a penalty so as to attract the provisions of Sec. 74 of the Indian Contract Act. The Companies Act does not bar a forfeiture clause of the type, but it specifically provides for it.[231]

- **Recovery of damages in shape of penalty:**

"Damages", as imposed by Sec. 14- B of the Employee's Provident Funds and Miscellaneous Provisions Act includes a punitive sum quantified according to the circumstances of the case. In "exemplary damages" this aggravating element is prominent. Constitutionally

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230 *Salt v. Marquiss of Northampton* (1892) AC. 1 : 61 L.J. Ch. 49, followed in *Raghunadhiya v. Sobina Saldanha,* 36 M.L.J. 161 : 49 I.C. 722 and *Venkata Satyanarayana v. National Insurance Co. Ltd .,* AIR 1947 Mad. 51: (1946) 2 M.L.J. 426; *Dwarika v. Bhagawati,* AIR 1939 Rang. 413 at p. 416.

231 *Bhagawati Prasad v. Shlromani Sugar Mills,* AIR 1949 All. 195 at p. 197.

speaking, such a penal levy included in damages is perfectly within the area of implied powers and the Legislature may, while enforcing collections, legitimately and reasonably provide for recovery of additional sums in the shape of penalty so as to see that avoidance is obviated. Such a penal levy can take the form of damages because the preparation for the injury suffered by the default is more than the narrow computation of interest on the contribution. The expression "damages" occurring in Sec. 14-B is, in substance, a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty under Sec. 14- B is not merely to provide compensation for the employees. The imposition of damages under Sec.14-B serves both the purposes. It is meant to penalise defaulting employer as also to provide preparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements of Sec. 6, but at the same time it is meant to provide compensation or redress to the beneficiaries, i.e., to recompense the employees for the loss sustained by them. There is nothing in the section to show that the damages must bear relationship to the loss, which is caused to the beneficiaries under the scheme.[232]

- **Reasonable compensation:**

The expression "reasonable compensation" means such compensation, as the Court, taking all things into consideration, deems just and equitable in the circumstances. It thus gives wide discretion to the Court:

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232 *Organo Chemical Industries v. Union of India*. AIR 1979 SC 1803 at pp. 1809. 1816.

"The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation, though, of course, the expression 'reasonable compensation'; used in the section necessarily implies that the discretion so vested must be exercised with care and caution, and on sound principles."[233] The inclusion in the contract of a stipulation for payment of liquidated damages excludes the right to claim any unascertained sum of money as damages. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they at the same time intended to allow the party who has suffered by the breach to give a go-bye to the sum specified and claim instead of a sum of money which was not ascertained or ascertainable at the date of the breach.[234]

If it thinks reasonable under the circumstances, there is nothing to prevent a Court from awarding a sum, which is equal to the sum, agreed upon, or the penalty stipulated for.[235] In *Sunder Koer v. Sham Krishen*,[236] the Privy Council awarded compensation at the same rate as the increased interest stipulated for. The mere fact that the plaintiff has

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233 *Nait Ram v. Shib Dat,* I.L.R. 5 All. 238 at p. 242 : *Nagappa v. Venkataramayya Reddi,* AIR 1931 Mad. 137 at-pp. 138: *Preston v. Humphreys,* AIR 1952 Cal. 315 at p. 318.

234 *Chunilal v. Mehta and Sons,* AIR 1962 S.C. 1314 at p. 1319: (1962) 1 L.L.J. 656.

235 *Abbake Heggadthl v. Kinhimma Shetty,* I.L.R. 29 Mad. 491 at p 496; *Mir Hazar Khan v. Sawan Ali,* 1910 P.R. 81; *Srinivasa Dikshltulu v. Rangayya,* 25 I.C. 702; *Bala Sunder Naiker v. Ranganadham Iyer,* AIR 1929 Mad. 794 at p. 796; *Raj Inder Bahadur Singh v. Bhagwan Dina,* 7 C.W.N. 963; *Muthu Chettiar v. Maruthunalgum Pillai,* AIR 1930 Mad. 428 at p. 428.

236 *Sunder Koer v. Sham Krishen*, I.L.R. 34 Cal. 150.

himself deemed it advisable to only claim compound interest at the lesser rate than what mentioned in the mortgage bond does not necessarily, preclude the Court from even granting a lower rate than that,[237] for the reason that, as soon as the original contract was deemed unenforceable, he is entirely in the hands of the Court and he cannot be permitted to substitute for the original one a new contract which he thinks reasonable.[238] But when in a case the contract was completed and the parties have mentioned a fixed sum as damages in case of breach, then ordinarily unless there is something to show that the amount is exorbitant or unconscionable, the Court would award that amount as damages for breach of contract.[239] In *Lachhman Das v. Bhoja Ram*,[240] it was held that it was not the plaintiff but the defendants who were responsible for the breach of the contract; and there can be no doubt that they must refund Rs. 3,200 which was paid to them as earnest money, and also Rs. 140 admittedly received by them for purchasing stamp paper. As regards compensation, it is impossible to fix with any reasonable certainty the actual amount of the loss resulting to the plaintiff from the breach of the contract; but the contract itself provides that in the event of a breach Rs. 3,200 was to be paid as damages by the party failing to perform his part of the contract, and no equitable ground has been made out which would justify interference with this stipulation. Such reasonable compensation will, however, be measured by the actual loss sustained by the plaintiff and the contract made by the parties estimating their

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237 *Gangadhar Rao Madhorao Chitnavis v. Parashram,* AIR 1928 Nag. 120 at p. 122.

238 *Challaphroo v. Banga Behan Sen*. 31 I.C. 394 at p. 396; *Panna Singh v. Aljun Singh,* AIR 1929 P.C. 179 at p. 180.

239 *Lekh Singh v. Dwarka Nath,* AIR 1929 Lah. 249 at p. 252.

240 *Lachhman Das v. Bhoja Ram*, AIR 1925 Lah. 284 at p. 286.

damages is itself evidence, though not conclusive, of the damages sustained.[241]

➢ **In a Calcutta case it was held:**

(1) That the sum of Rs. 50 per day is liquidated damages and not penalty. The sum was payable on a single event only, viz. non-completion of the delivery of the plant by 06/03/1952.

(2) It was proposed to award compensation at the rate of Rs. 25 per day.

(3) It is clear that on 25/04/1952, the plaintiff cancelled the contract and put it out of the power of the defendant to fulfill his obligation under the contract. So the plaintiff is entitled to Rs. 25 per day upto the 25/04/1952. Therefore, for the period 07/03/1952 to 25/04/1952, the plaintiff is entitled to Rs. 1,250 on this head of claim.

(4) That the effect of this clause for compensation was that in case the defendant failed to complete the delivery of the plant by 06/03/1952, the plaintiff would accept the performance of the contract after the stipulated time subject to the payment of damages which are fixed. Mere extension of time is only a waiver to the extent of substantiating the extended time for the Original time but this did not amount to a waiver of the provision for compensation.[242]

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241 *Mahadeo Prasad v. Siemens (India) Ltd* , AIR 1934 Cal. 285 at p. 287.

242 *M. Preston v. J.S. Humphreys,* AIR 1955 Cal. 315 at pp. 315. 316. 318; (1954) Cr. L.J. 178.

- **Measure of damages:**

Under Sec. 73 of the Indian Contract Act where the buyer commits breach of contract by refusing to accept goods offered to him by the seller, the measure of compensation is the difference between the contract price and the actual price of the goods. This is amply borne out from the language of the section as well as from Illustration (d) appended to it. Failure to earn expected profit by the seller out of the bargain would be covered by the expression "any low or damage caused to him thereby" used in Sec. 73.[243] The method of computing the damages is the same as in cases where the parties have not fixed any sum in the contract, and the general rules contained in Sec. 73 of the Indian Contract Act discussed in the foregoing chapters have to be applied in assessing them.[244] Thus, in a case where a certain quantity of indigo plant was not delivered according to contract and though the parties had provided for the payment of a certain sum as damages in cases of default, it was said that, in arriving at the "reasonable compensation payable to the plaintiff. it is necessary to ascertain the quantity of indigo which would have been pressed out of the stipulated quantity of indigo plant, to ascertain the price at which indigo might have been fairly sold in the market during the season to which the contract relates, and to deduct from such price the ordinary charges on producing and selling the quantity of indigo in question."[245] Again, where the defendant agreed to borrow a sum of Rs. 20,000 on a mortgage for three years from

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243 *Cohen v. Cassim Nana,* I.L.R. 1 Cal. 264 : *Union of India v. S Kesar Singh*, AIR. 1978 J. & K. 102 at p. 107.

244 *Datubhai Ibrahim v. Abubakar Molidina*, I.L.R. 12 Born. 242 at p. 245; *Acharat Singh v. Sant Singh*. AIR. 1935 Pesh. 57 at p. 58.

245 *Nait Ram v. Shib Dat,* I.L.R. 5 All. 238 at pp. 242, 243.

the plaintiff at the rate of 7½ per cent, per annum and also agreed that in the event of his default he would pay the interest on the whole amount for the full period of the loan. it was held that the only reasonable compensation which the plaintiff was entitled to get is the difference in interest between the agreed rate and that realized by the plaintiff from his banker with whom the money was deposited for such period (four months in the case) as might be reasonably required to find another borrower, together with the expenses and cost incurred in preparing the necessary deeds.[246] So also in the case of a breach of contract to purchase property the damages though fixed by the parties, may be awarded according to the difference between the contract price and the market price.247 But it has been stated that where the parties have themselves fixed the value of their rights, that amount is the proper measure of damages sustained,[248] and therefore, in such a case where the Court thinks it to be a reasonable sum, an inquiry into the quantum according to the rules contained in Sec. 73 would be useless.

- **Measure of damages under Sec. 74 of the Indian Contract Act:**

Section 74 of the Indian Contract Act deals with the measure of damages in two classes for cases:

(i) where the contract names a sum to be paid in case of breach, and

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246 *Dutubhai Ibrahim v. Abubaker Molidina,* I.L.R. 12 Born. 242 at p. 246; *Dadabhoy v. Pestonji,* I.L.R. 17 Born.

247 *Lakshmanan Chetti v. Subramanyam Chetty,* 50 I.C. 69: 9 L.W. 312.

248 *Koer' Sen v. Sukho,* 27 I.C. 503 : 13 A.L.J. 6.

(ii) where the contract contains any other stipulation by way of penalty. The measure of damages in the case of breach of a stipulation by way of penalty is by Sec. 74 reasonable compensation not exceeding the penalty stipulated for. It is that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contract which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.[249]

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[249] *Maula Bux v. Union of India*, AIR 1970 S.C. 1955 at pp. 1958-1959: *State of Gujarat v. M.K. Patel and Co ..* AIR 1985 Guj. 179.

- **Stipulation by way of penalty-Necessity of proving actual damage:**

An undertaking to pay a sum of money or to forfeit a sum of money fixed in terrorem without reference to any estimated damages on breach of the contract is in the nature of a penalty and the party claiming compensation must prove the loss suffered by him. The undertaking to pay the sum of Rs. 10,000 without reference to any actual damages is only in the nature of a penalty. The duty of the Court "not to enforce the penalty" arises in this case. The stipulation in any contract for payment of any particular sum or forfeiture of the amount already paid as advance is relevant only to fix the maximum amount that could be awarded as against the party in breach. The Court has to exercise the discretion to award only such amount as may reasonably be estimated to be damages arising out of the breach. Where it is possible to prove actual damage sustained as here. It is necessary for the party not in breach to prove the actual amount of damages suffered, so that to that extent the amount already paid may be allowed to be retained. In the instant case there is no proof of any amount actually suffered as damages. In these circumstances, there is no scope for any cut being affected out of the amount paid to the defendants. The defendants are bound to repay the sum of Rs. 10,000. There is no justification for awarding interest prior to the suit.[250]

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[250] *Ramaswamy Gounder v. Kuppuswami Gounder,* (1978) 2 M.L.J. 313 at p. 318.

- **Duty of the plaintiff to prove loss, when loss can be determined in terms of money:**

In *Maula Bux v. Union of India,*[251] it has been held that the expression "whether or not actual damage or loss is proved to have been caused thereby" occurring in Sec. 74 of the Indian Contract Act, is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with the established rules. Where the Court is unable to assess the compensation, the sum named by the parties, if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him. This ratio has also been approved by the decision in *Union of India v. R.D. & Co.*[252]

- **Actual loss need not be proved:**

A plaintiff is entitled under this section to recover compensation, even though he has suffered no actual loss or damage from the defendant's breach. This constitutes a material departure from the rule contained in Sec. 73, which lays down that, in order to recover compensation under that section. It is necessary for a plaintiff to prove actual loss or damage. But in assessing the amount of "reasonable compensation" payable under Sec. 74, the Court will be

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251 *Maula Bux v. Union of India*, AIR 1970 S.C. 1955.

252 *Union of India v. R.D. & Co.,* AIR 1973 SC 1908; *Nagpur Nagank Sahakari Bank Ltd. v. Union of India,* AIR 1981 AP 153 at pp. 160, 161.

guided by the amount of actual loss sustained.[253] If the Court considers that the sum named is not excessive or unreasonable it shall allow it or otherwise reduce it LO the figure it considers reasonable. In cases where there is no data to estimate the amount of damages actually caused the discretion of the Court is unfettered in allowing what it considers "reasonable compensation" subject to the maximum fixed by the parties. Where a party asserts that the amount mentioned in case of breach is a "genuine pre-estimate of damages" calculated by the contracting parties, and should not be disturbed on that account, it must be established that this is so, and the Court, if satisfied, will adopt it as "reasonable compensation" to be awarded. But the final say is with the Court and not with the litigant.[254] If as a matter of fact no loss is proved to have been sustained by the plaintiff, which fact may be taken into consideration in fixing the quantum of damages payable as reasonable compensation under the section.[255] That is to say, where no actual loss is proved to have been suffered owing to the breach of contract, which contained a penalty for the breach of it, the Court will award such compensation as it considers reasonable under the circumstances having in view the fact that the plaintiff has not suffered any loss.[256] If on the other hand, the case is one, in which exnecessitate rei, it is impossible to fix the exact amount of damages, the Court will not exercise the power conferred by Sec. 74 of reducing

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253 *Panna Singh v. Aljun Singh,* AIR 1929 PC 179 at p. 180; *Pasalapudi Brahmayya v. Tugala Gangarasu* (1963) 1 Andh. W.R. 149.

254 *Moolchand Behan Lal v. Chand & Co ..* 48 P.L.R. 243.

255 *Meyappa Chetty v. Nanchamma Achi,* AIR 1929 Mad. 783 at p. 784; *Satyanarain Amolchand Bhutt v. Vital Narain Gawdar,* AIR 1959 Born 462 at p. 468 : 59 Born. L.R. 1071 : I.L.R. (1957) Born. 840.

256 *Ramnath Zutshi v. Secretary of State.* 12 I.C.46.

the contract damages.[257] What Sec. 74 means is that a party cannot get the full amount mentioned in the contract as a matter of absolute right or as a matter of course. If the party proves that he has suffered damage to the extent of the full amount or that the Court considers, even without any proof, that the full amount is a reasonable compensation which can be awarded under the circumstances the Court can award the full amount. One thing, however, is clear, viz. that the party is entitled to get some amount not exceeding the sum named, which the Court considers as reasonable compensation whether or not actual loss or damage is proved to have been suffered by him.[258]

- **Right to a reasonable compensation:**

The Supreme Court in *Fatehchand v. Balkishan Dass*,[259] has pointed out that a Court could grant a relief by granting a reasonable compensation where the Court is of the opinion that the compensation claimed amounts to a punishment or is one which acts in terrorem. At the same time, their Lordships observed that Sec. 74 of the Indian Contract Act, 1872, undoubtedly gives an aggrieved party a right to reasonable compensation from the Court for a breach of contract. It is not disputed that the applicants in both the contracts had committed a serious breach of the contract. In fact, counter-affidavit filed by the respondents would clearly show that the contractors made grossly inadequate supplies and that too far beyond the period fixed. Having regarded,

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257 *Mir Hazar Khan v. Sawan Ali.* 81 P.R. 1910; 148 P.L. 1910.

258 *Preston v. Humphreys,* AIR 1955 Cal. 315 at p. 318: *Pravudayal v. Ramkumar.* AIR 1956 Cal. 41 : 95 C.L.J. 280; *Govind Chandra Sambarsingh v. Mahapatra Upendra Singh*, AIR 1960 Orissa 29: 25 Cut. L.J. 360.

259 *Fatehchand v. Balkishan Dass*, AIR 1963 SC 2405.

therefore, to those circumstances, it cannot be said that the arbitrator was not justified in granting even one-half of the total compensation claimed by the respondents. The mere fact that the arbitrator has ignored certain legal principle in awarding compensation to the applicants will not be sufficient to attract the jurisdiction of the Jammu and Kashmir Court to interfere under Sec. 30 of the Indian Arbitration Act, unless it is shown that from the reasons given by or the notes appended to by the arbitrator in his award these principles have been misconstrued.[260]

10.12 CONCLUSION:

At common law the question whether the sum of money or other performance so stipulated for, is a penalty or liquidated damages can only arise when the event upon which it becomes payable is a breach of the contract between the parties. It does not arise where the obligation to pay exists on entering the contract as an advance payment or deposit, or is a true alternative mode of performing the contract. The distinction has given rise to litigation in the context of hire purchase agreements. Finance companies sometimes provide that, in the event of termination of the agreement, not only shall they be entitled to take possession of the goods hired and to forfeit installments already paid, but that the hirer shall also pay a certain sum as compensation for 'loss of profit on the transaction'. If the hiring is terminated as a result of a breach of the agreement by the hirer, the Courts may hold this payment to be a penalty in terrorem. But if it is terminated voluntarily by the hirer, or by his death or bankruptcy, so that there is no breach of the agreement, the

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260 *Sardar Baldev Singh Sardool Singh v. Union of India,* AIR 1965 J. & K. 28 at p. 31.

question of a penalty or liquidated damages cannot arise. This produces the anomaly that it may be more expensive for a hirer to behave honourably and terminate the agreement voluntarily than to repudiate and break the contract-a situation which has now been mitigated by the Consumer Credit Act 1974 in respect of credits not exceeding £15,000 to individuals and by the Unfair Terms in Consumer Contracts Regulations 1994 in respect of terms in sale and supply contracts with consumers. The courts have, however, been unwilling to extend the common law rule.

Where the clause is a liquidated damages clause the plaintiff will recover the stipulated sum without being required to prove damage and irrespective of any actual damage, even where this is demonstrably smaller than the stipulated sum.1H9. However, where the actual loss is greater, the plaintiff is limited to the stipulated sum. In Cellulose Acetate Silk Co. Ltd. v. Widnes Foundry Ltd,261:

The appellant agreed to pay 'by way of penalty the sum of £20 per week for every week we exceed 18 weeks' in the delivery of certain machinery. Calculated on this basis, the damages recoverable by the respondent on breach amounted to some £600, but its actual loss amounted to £5,850. It therefore claimed that it was entitled to disregard the penalty and to sue for the damages actually suffered.

It was, however, clear from the circumstances that the parties must have known that the damage, which would be incurred, might greatly exceed the stipulated sum. The

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261 *Cellulose Acetate Silk Co. Ltd. v. Widnes Foundry Ltd.,* [1933] A.C. 20; affirming *Widnes Foundry v. Cellulose Acetate Silk Co.*, [1931] 2 K.B. 393.

House of Lords therefore held that the sum was not a penalty, but was merely the amount which the appellant had agreed to pay by way of compensation for delay, and that the damages must be limited to this agreed amount.

Where a clause is held to be penal, the damages incurred must be assessed in the usual way. In such circumstances the plaintiff might be able to recover a sum greater than the stipulated sum. Even though, it cannot be said that the clause has a penal effect in such circumstances and although this means that a plaintiff who has acted unfairly by inserting a penal clause would be treated more favourably than one whose clause is a genuine attempt to 'liquidate' prospective damages. However, this result can be seen as following from the principle that the validity of a clause is determined by reference to the time at which the contract is made.

CHAPTER - XI

QUANTUM AND MITIGATION OF DAMAGES

11.1 INTRODUCTION:

To understand the exact meaning of word “Quantum of Damages”, one has to first understand the meaning of word “Measure of Damages”. The expression “Measure of Damages” is a technical phrase, which signifies the basis the footing, or the standard upon which the amount of damages in any given case is calculated. There are several factors, which influence Judges, Juries or any other decision making authority in determining the quantum of damages, which is to be awarded to a plaintiff who is complaining of an injury at the hands of the defendant. Even after this long time of development of the law of damages, there is no invariable and fix rule available to be followed in the determination of the question, as to what is the exact amount of compensation, which the injured party is entitled to receive for injury caused to him. In making this attempt to pay the compensation in a nature of damages or in their endeavour to place the plaintiff in the position he occupied before he sustain the injury, the courts of law have often to speculate in a vague field. For example, in some cases, in case of breach of contract, with exception of the breach of promise of marriage, the determination of the amount of damages is a simple matter depending upon the consideration of a simple and more clearly define set of circumstances. The whole difficulty is due to the endeavour to reduce every injury and the resulting damage to money value. In case of contract, it is easy to define the injury in

terms of money, for almost every contract has pecuniary value attached to it. But in case of wrongs other than those arising from contract it is most difficult rather impossible to set a money value upon the injury suffered, in terms of money, the injury sustain by the loss of a limb or by wounded feeling? It is, at the best, a vague of speculation in a dark field and courts of law have often confess inability to make a complete and adequate compensation under the head damages, however, much more the sufferer may deserve the same.

Lord Halsbury, L.C., has pointed out the aforesaid concept in his own beautiful framework of flowery language. His Lordship pointed out that "the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages, nevertheless it is remitted to jury, or those who stand in the place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case, how is anybody to measure pain and suffering in money's count? Nobody can suggest that you can by any arithmetical calculation, establish what is the exact amount of money which would represent such a thing as pain and suffering which a person has undergone by reason of an accident. In truth, I think, it would be very agreeable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But nevertheless the law recognizes that as a topic upon which damages may be given."[1] There is thus, some degree of inevitable speculation and uncertainty in

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[1] *The Mediana,* (1900) A.C. 113; *United India Fire and General Insurance Company Ltd., Guntur v. Mowli Bai,* AIR 1985 A.P. 263 at pp. 266, 267.

measuring the amount of damages for a given wrong, and Baron Wilde has rightly observed in *Gee v. Lancashire and Yorkshire Rly. Co.,*[2] that the question of the measure of damages has produced more difficulty than, perhaps, any breach of the law.

But yet, eminent Judges have, from time to time, laid down certain rules and standards in accordance with which Courts of law have to be guided in awarding compensation for a given injury; and these rules have become known as "measure of damages", by which you determine the quantum of damages payable to the injured party. In actions for breach of contract, it may be found possible to measure the damages with precision and a near approach to accuracy but more often they are not commensurate with the loss actually suffered. In actions in case of breach of contract, the measure of damages can be more accurately calculated, but in cases of personal wrongs no hard and fast rule can be laid down and the measure depends upon a variety of circumstances. More frequently they are not given to the full extent of a perfect compensation commensurate with the injury sustained.

➢ **QUANTUM OF DAMAGES:**

11.2 FUNDAMENTAL PRINCIPLE TO DETERMINE THE QUANTUM OF DAMAGES:

There are three fundamental principles upon which the entire law proceeds to determine the quantum of damages. Those three fundamental principles are listed as below:

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[2] *Gee v. Lancashire and Yorkshire Rly. Co.,* (1860) 6 H & N. 211.

(I) *Restitutio in integrum*;

(II) Remoteness of damage; and

(III) Mitigation of damage.

Now let us understand the aforesaid three fundamental principles, which determine the quantum of damages in detail with reference and discussion of decided case law in England and India as well.

11.2.1 *Restitutio in integrum:*

The first and foremost principle to determine the quantum of damages is restitution *in integrum*. It has already been observed, in all cases of wrongful acts, which are arising out of breach of contract, the law only adopts the principle of *restitution in integrum* subject to the qualification that the damages must not be too remote. In other words, that they must be such damages as flow directly and in the usual course of things from the wrongful act.[3] Therefore, where an injury is to be compensated by damages, in settling the sum of money to be given in reparation of the damage, one should as nearly as possible get at least that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting compensation or reparation.[4] In other words, the award must be of such a sum as that by which he is the worse for the defendant's wrong doing. The rule appears to be the same in actions upon contract also, for a party who has

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3 The *Argentino,* (1888) 13 P.D. 191.

4 *Livingstone v. Rawyards Coal Co.,* (1880) 5 A.C. 25; *Hermanand Mohatta v. Asiatic S.N. Co.,* AIR 1941 Sind 146 at p. 150.

sustained loss by reason of a breach of contract is, with respect to damages, entitled to be placed in the same situation as he would have been in if the contract had been performed.[5] But as Lord Dunedin has forcibly put it, "*restitution in integrum* is a phrase which is properly applied when you wish to express a condition which is imposed upon a person seeking to rescind a contract. The true method of expression, I think is, that in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, in so far as money can be, the loss which he has suffered as the natural result of the wrong done to him."[6]

There is no particular limit to the amount of damages that can be awarded by a court of law, and in proper cases the amount may rise to almost any sum of money[7] while, on the other hand, it may be a single farthing.[8] It is largely in the discretion of the Judge or the jury, but is regulated by well-established rules.

11.2.2 Remoteness of damage:

The next principle in determining the quantum of damages is the rule of the concept of remoteness of damage in case of breach of contract. This entire concept has sufficiently elaborated in a previous chapter of the research work. However, at the cost of repetition and to give an idea about the fundamental principle of quantum of damages in a continuation of two other principles the researcher wants to

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5 *Robinson v. Harman,* (1848) 1 Exch. 885.

6 *Admiralty Commissoner v. S.S. Valeria,* (1922) A.C. 42; *Rogers Shellac Co. v. John King & Co.,* AIR 1926 Cal. 564 at p. 565.

7 *Jugul Kishore Marwari v. Babu Homeshwar Singh,* AIR 1922 Pat. 79 at p. 84.

8 *Mostyn v. Coles,* (1862) 7 H. & N. 872.

give an idea about the said concept in nutshell. It frequently happens that when a wrongful act is committed, a person suffers damage, but although he may have a cause of action for wrongful act, yet he cannot lay any claim for compensation for the damage, because the connection between the damage and the wrongful act is too remote. This is precisely what is called the principle of “remoteness of damages”. The principle of remoteness of damages is based upon the very well known Latin maxim “*injure non remota causa sed proxima spectator*”, and prevents the plaintiff from recovering any damages that do not flow or arise as a direct consequence of the wrongful act complained of.

11.2.3 Mitigation of damage:

Last amongst the three universally recognized principle is that which underlines the rule as to mitigation of damages. This concept is required to be discussed in detail so here the researcher would like to give an idea about the said in few words. In all claim for damages arising out of breach of contract, a duty is cast upon the plaintiff to mitigate or minimize the damages. By saying this, the position has been made very clear by the Courts, Jury or decision making authority that the burden is cast upon the plaintiff to take all reasonable an possible precautions to reduce the amount of loss or damage arising from the breach committed by the other side i.e. defendant. Any loss or damage, which with the exercise of reasonable care the plaintiff could have avoided, will be deemed too remote to be recoverable.

11.3 *QUIA TIMET ACTION*:

While discussing the concept of quantum of damages it is very necessary to understand it clearly that it is certainly not mandatory for the court to grant or to award damages as and when the injured comes up before the court for asking the damages for breach of contract. Rather it is more appropriate to say that it is discretion of the court to decide that whether a particular claim for damages filed because of some breach committed in performance of contract is genuinely required to be awarded. So to utilize this discretion lawfully, reasonably and within four corners of legal, economic and social structure the courts have imposed certain restrictions upon themselves and as a part of that the courts have settled down certain standard requirements, which are required to be fulfilled before awarding damages or before quantifying the damages.

In more recent cases decided by Hon'ble Bombay High Court,[9] a different note is struck to the effect that the court is not bound in all cases to award damages under Section 73 of the Indian Contract Act, on the higher scale, but that the stricter rule of English law can be applied under appropriate circumstances, even in cases arising in this country. In these cases it was assumed that in all contracts for sale of land there is an implied agreement that, if without any default on the part of the vendor, he was unable to make out a marketable title, the bargain would be off and the vendor would only have to pay damages on the lesser scale.

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9 *Vallabhdas v. Nagardas,* 23 Bom. L.R. 1213; *Shamsuddin v. Dayhabhai,* AIR 1924 Bom. 357 at pp. 357, 358.

Where the circumstances of a particular case show that the purchaser is aware of the difficulties which the vendor had to face in clearing an adverse title over the subject-matter of sale, and the failure on the part of the vendor to complete the contract was due not to any willful default on his part, but solely to the impossibility of removing the adverse claim within the time fixed for performance of the contract, it was held that the purchaser may be entitled to recover no damages at all.[10] So also, where according to the contract the vendee is required to purchase within a certain time but defers the performance for an unreasonable length of time, and the vendor rescinds the contract, the vendee is not entitled to claim damages for the breach.[11] According to these cases no hard and fast rule can be laid down for the assessment of damages for breach of contract to sell immoveable property but much depends upon the circumstances of each case. Section 73 of the Indian Contract Act, does not authorize the award of damages in very case without reference to the circumstances. There is an amount of discretion retained in the court in making the award, and regard must be had to the actual loss, which the plaintiff had sustained.[12]

11.4 QUANTUM OF DAMAGES IN CASE OF ACQUISION OF LAND UNDER THE CONTRACT:

The appropriate and proper quantum of damages on the scale is the different between the contract price and market prize on the date of breach of contract. Meaning thereby, damages have to be calculated on the price of property at

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10 *Dhanarajgirji v. Tata and Sons,* AIR 1924 Bom. 437 at p. 479; *Kapadganj Municipality v. Ochhavlal,* AIR 1928 Bom. 329 at p. 332.

11 *Surti Chetti v. Gadala Parthasarthy,* 61 I.C. 457.

12 *Dhanarajgirji v. Tata and Sons,* AIR 1924 Bom. 437 at p. 479.

the date of the breach of contract.[13] There is, however, a difficulty informing an exact estimate of the market value of immoveable property, unlike the case of moveable property, courts have adopted two methods for estimating the value for purposes of awarding compensation for breach.

Firstly, the price at which the plaintiff had contracted to resell the property has to be taken as evidence of the market value, provided it was a *bona fide* re-sale.

Secondly, where the defendant had agreed to re-sell the property to a third person, that re-sale price may be taken as the measure since it serves as evidence of the market value in the absence of anything to show it was fraudulent.[14] But, whatever may be the evidentiary value of the re-sale price in the above method they are irrelevant for the purpose of reducing the damages below the market price if any available.[15] If the vendor sells the property to a third person in breach of the contract, and obtains a higher price, the measure of damages in such a case is the difference between the two prices.[16]

So also, if in the meantime the property were required by Government the difference between the agreed price and

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13 *Akhtar Beg v. Haq Nawaz,* AIR 1924 Lah. 709 at p. 711; *Pannalal v. Hussaing Beg,* AIR 1924 All 167; *Abdul Ali v. Gokuldas,* AIR 1927 Sind 49 at p. 52; *Raj Coomar Rai v. Rajah Debendro Narain,* 15 W.R. 41; *Dhanrajgirji v. Tata & Sons,* AIR 1924 Bom. 473; *Lakshman Chetty v. Subrahmanya Chetty,* 501 I.C. 69; Daniel, In re 91917) 2 Ch. 405 : 87 L.J. Ch. .69.

14 *Goodwin v. Francis,* (1970) L.R. 56 P. 296; *Goffin v. Houlder,* (1921) 50 L.J. Ch. 488; *Ridley v. DeGurto,* (1945) 2 All ER 654.

15 *Branding v. McNill,* (1946) Ch. 145.

16 *Radha Kishun Kaul v. Shankar Das,* AIR 1927 Lah. 252 at p. 255; *Trilokyanath Biswas v. Joykali Chowdrani,* 11 C.L.R. 454.

the amount at which the land was valued in the land acquisition proceedings, apart from the statutory allowance for the compulsory sale, will be the measure.[17]

11.5 CONCEPT OF LOSS OF PROFIT AS A SPECIAL DAMAGE:

Ordinarily, the purchaser cannot lay claim to the profits, which he would have made if the contract had been performed, as by fulfilling his contract with a third person. Profits to be claimed must be laid as special damage under the second rule in Sec. 73 of the Indian Contract Act, as damage, which the parties knew when they made the contract to be likely to result from the breach.[18] If the vendor knew about the contract which the purchaser had entered into for the sale of the property to a third person, or were informed about it at the time of making the contract, loss of profits under such a contract would be the proper measure. In the absence of any of those special circumstances the ordinary measure, namely, the difference between the contract price and the market price has to be applied. At the same time it may b e stated that the profit, which the purchaser could have made in a re-sale, if uncontradicted by other evidence, is evidence of the market value. Any other special damage, if properly laid can also be recovered, as for instance, loss of business by not getting settled in the house.[19]It cannot, however, be said that anyone entering into contract must be treated as having constructive notice of the nature of the other party's business or of its probable bearing on the loss which the

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17 *Nabin Chandra Saha v. Krishna Baroni,* 9 I.C. 525.

18 *Dhanrajgiriji v. Tata and Sons,* AIR 1924 Bom. 473 at p. 479; *Abdul Ali v. Gokuldas Lalji,* AIR 1927 Sind 49 at 52; *Janaki Nath v. Jamini Kanta,* 22 I.C. 612.

19 *Ward v. Smith,* (1832) 11 Price 19; *Jaques v. Miller,* (1877) 6 Ch.D. 153.

other party might suffer in consequence of a breach of contract. In *Diamond v. Campbell Jones*,[20] the defendants agreed to sell to the plaintiff a leasehold interest for a term expiring in the year 2003 in property comprising of a basement and ground floor and four upper floors. The agreement was expressed to be subject to and with the benefit of a contract for the grant of a new lease requiring the conversion of the property into a ground floor office and residential accommodation to be carried out by the lessee. In a suit for the repudiation of the contract the plaintiff claimed damages measured at the profits he would have realized if he had converted the property as contemplated and required by contract and had disposed of the premises when so converted. The plaintiff was dealer in real property, but it was neither pleaded nor shown in evidence that the defendants knew what his occupation was or that he intended to carry out a conversion of the premises. The market value of the property at the date of the breach, without having been converted substantially exceeded the original contract price. It was held that the plaintiff was only entitled to recover his difference in price, which would be the profit he might make on sale, but not profit he would have made upon conversion and sale in the absence of special circumstances to justify imputation of knowledge that the purchase intended to use the land in a particular manner.

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[20] *Diamond v. Campbell Jones,* (1960) 1 All ER 583; *Goffine v. Houlder,* (1921) 90 L.J. Ch. 488; *Ridley v. De Gurto*, (1945) 2 All ER 654.

- **MITIGATION OF DAMAGES:**

11.6 VARIOUS MEANINGS OF THE TERM "MITIGATION":

The expression "mitigation of damage" is an umbrella term applied to a number of matters some of which are related and some of which are completely unconnected. Surprisingly, in view of the importance of the subject, these differences have not been fully analyzed in English law; yet it is vital to an understanding of the issues to separate the various meanings of the term.

11.6.1 Principal meaning: The three rules as to the avoiding of the consequences of a wrong:

The principal meaning of the term "mitigation", with which this topic deals, concerns the avoiding of the consequences of a wrong arising out of breach of contract, and forms probably the only exact use of the term. Even if the subsidiary or residual meanings enumerated below cannot strictly be called incorrect, it would be well if the use of the term "mitigation" in connection with them was qualified, if not completely discarded, as matters are only confused by employing one term to describe disparate concepts.

The principal meaning itself comprises three different, although closely interrelated, rules. This analysis into three rules, although clearly implicit in the cases, is one, which has not formerly been given explicit statement in English law. It is submitted that such a division lends clarity to a difficult topic. The three rules are these:

(1) The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.

(2) The second rule is the corollary of the first and is that, where the plaintiff does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the plaintiff can recover for loss incurred in reasonable attempts to avoid loss.

(3) The third rule is that, where the plaintiff does take steps to mitigate the loss to him consequent upon the defendant's wrong, and these steps are successful, the defendant is entitled to the benefit accruing from the plaintiff's action and is liable only for the loss as lessened; this is so even though the plaintiff would not have been debarred under the first rule from recovering the whole loss, which would have accrued in the absence of his successful mitigating steps, by reason of these steps not being ones which were required of him under the first rule. Put shortly, the plaintiff cannot recover for avoided loss.

11.6.2 Different subsidiary or residual meanings:

There are subsidiary or residual meanings of the term "mitigation". These have no connection with the three rules comprised in the principal meaning, because they are not

concerned with the avoiding of the consequences of the defendant's wrong but come into play at an earlier stage in the matter. The first appears in cases where the conduct, character and circumstances of the plaintiff and the defendant affect the assessment of the damages; the second appears in cases where both the plaintiff and the defendant are in breach of contract.

(1) In certain breach of contract, measure of damages may be affected by the conduct, character and circumstances of both plaintiff and defendant. These factors are said to go in aggravation for in mitigation of the damage. Thus the damage is most commonly aggravated, and the damages correspondingly increased,[21] by the defendant's bad motives or willfulness; the prime illustration of this is in defamation where one of the principal elements in estimating the damages is the malice of the defendant. The damage may also be aggravated by reason of the good character and reputation of the plaintiff, but there is less authority on this because generally no evidence can be introduced to show the good character o the plaintiff unless his character is attacked in evidence by the defendant. Conversely, the damage may be mitigated, and the damages corresponding reduced, either by the defendant's bona fides or by the bad character and reputation of the plaintiff.

This meaning of the term "mitigation" simply deals with particular items which go to show that the injury is not as great as would prima facie appear: no question of subsequently lessening the loss arises. Indeed in all cases it is important to look and see what the actual injury is,

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21 *Rookes v. Barnard;* [1964] A.C. 1129.

quite apart from subsequent steps taken by the plaintiff, and if it is shown to be less than normal, the measure of damages will be less than the normal measure in that particular kind of case; there is no need to say that the damages are mitigated by the amount by which they are less than the normal measure. The particular cases, both as to mitigation and as to aggravation, are therefore best dealt with when dealing with the particular wrong, which give rise to them.

(2) Where the plaintiff, suing the defendant in respect of his failure to perform a contract, is also himself in breach of contract, the loss thereby accruing to the defendant may in certain cases go in mitigation or reduction of the amount, which the plaintiff can recover in his action. Such cases tend to arise when the plaintiff's action is not for damages for breach of contract, but is for money payable by the terms of a contract, such as the price or value of goods sold,[22] of services rendered,[23] or of a combination of the two.[24]

This meaning of the term "mitigation" deals with the manner in which damages resulting from a breach of contract by the plaintiff can be deducted from the claim made by the plaintiff in respect of that contract. It is analogous to cases of contributory negligence in that both parties are at fault and a subtraction is made: nevertheless a reduction of damages on the ground of contributory negligence is not referred to as "mitigation". The only question that arises in these contract cases is a mater of procedure and of pleading, namely whether the defendant can claim the

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22 *Parsons v. Sexton,* (1847) 4 C.B. 899.
23 *Chapel v. Hicks,* (1833) 2 Cr. 7 M. 214.
24 *Allen v. Cameron,* (18330 Cr. & M. 832.

damages for the plaintiff's breach in full or in part with or without pleading the matter as set-off or counterclaim. This question is not germane to a textbook on damages and does not call for treatment. Whether, where such a reduction is allowed, the measure of reduction could have recovered in a separate action against the plaintiff.

11.7 THE RULES AS TO AVOIDABLE LOSS: NO RECOVERY FOR LOSS WHICH THE PLAINTIFF OUGHT TO HAVE AVOIDED:

The extent of the damage resulting from a wrongful act i.e. breach of contract; can often be considerably lessened by well-advised action on the part of the person wronged. In such circumstances the law requires him to take all reasonable steps to mitigate the loss consequent on the defendant's wrong, and refuses to allow him damages in respect of any part of the loss, which is due to his neglect to take such steps. Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss, which could be avoided by reasonable efforts, or to continue an activity unreasonably so as to increase the loss. This well-established rule finds its most authoritative expression in the speech of Viscount Haldane L.C. in the leading case of *British Westinghouse Co. v. Underground Ry*[25] where he said:

"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming

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[25] *British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.

any part of the damage which is due to his neglect to take such steps."[26]

There are a few general points about this doctrine, which may conveniently be collected at this stage.

(a) Application to contract:

Lord Haldane referred only to pecuniary loss but presumably because he was dealing with a breach of contract. Most cases do indeed stem from contract and concern the mitigation of pecuniary loss; but the principle applies equally to non-pecuniary loss, as in the case of a plaintiff who, having been physically injured, fails to take reasonable steps to obtain medical aid and thereby fails to cut down the pain and suffering resulting from the injury.

(b) The question of duty:

Lord Haldane spoke of the plaintiff as having a duty to mitigate, and this is the common and convenient way of stating the rule. The expression is, however, a somewhat loose one since there is no "duty" which is actionable or which is owed to anyone by the plaintiff. He cannot owe a duty to himself; the position is similar to that of a plaintiff whose damages are reduced because of his contributory negligence. Pearson L.J. in *Darbishire v. Warran*[27] gave the proper analysis when he said:

"It is important to appreciate the true nature of the so-called `duty to mitigate the loss' or `duty to minimize the damage'.

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26 *Dunkirk Colliery Co. v. Lever,* (1878) 9 Ch.D. 20, C.A.; *Jamal v. Molla Dawood,* [1916] 1 A.C. 175.

27 *Darbishire v. Warran,* [1963] 1 W.L.R. 1976, C.A.

The plaintiff is not under any contractual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant."[28]

This has been re-emphasised by Sir John Donaldson M.R., delivering the judgment of the court in The Solholt, where he said:

"A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase `duty to mitigate'. He is completely free to act as he judges to be in his best interests. One the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly caused by the defendant's breach of duty."

(c) The question of onus:

The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the plaintiff ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has been long settled, ever since the decision in *Roper v. Johnson,*[29] and was confirmed by the House of Lords in *Garnac Grain Co. v. Faure &*

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28 *Wallems Rederij v. Muller ,* [1927] 2 K.B. 99

29 *Roper v. Johnson,* (1873) L.R. 8 C.P. 167.

Fairclough[30]. Yet in *Selvanayagam v. University of the West Indies*[31] the Judicial Committee of the Privy Council held that, where a physically injured plaintiff had refused to undergo medical treatment to alleviate his injury, the burden was on him to prove that he had acted reasonably, a burden, which he was found to have discharged. Any suggestion that personal injury may differ from the commercial context which gave the rule as to onus its nemesis comes up against the two authoritative decisions of the House of Lords in which it was laid down that the burden of proof remains with the defendant in the particular case of the refusal of medical treatment, namely *Steele v. Robert George & Co.*[32] and *Richardson v. Redpath, Brown & Co.*[33] the latter case was indeed cited by their Lordships in Selvanayagam but without any appreciation of what it had to say on the burden of proof, and their suggestion that the Australian case of *Fazlic v. Milingimbi Community Inc.*[34] places the burden of proof on the plaintiff does not survive an examination of that decision. The Guildford, the remaining authority cited by Their Lordships, was more explicitly misrepresented. While a passage from Lord Merriman's judgment there was prayed in aid in support of their Lordships' confident assertion that they "had no doubt" that the plaintiff had the burden of proof and that this was "well established", Lord Merriman was dealing not with mitigation at all but with remoteness, where there has been a substantial degree of controversy on burden of proof with the better view favouring a plaintiff's burden. One can only conclude that the decision of the Privy Council, being

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30 *Garnac Grain Co. v. Faure & Fairclough,* [1968] A.C. 1130

31 *Selvanayagam v. University of the West Indies,* [1983] 1 W.L.R. 585, P.C.

32 *Steele v. Robert George & Co.,* [1942] A.C. 497.

33 *Richardson v. Redpath, Brown & Co.,* [1944] A.C. 62.

34 *Fazlic v. Milingimbi Community Inc.,* (1982) 38 A.L.R. 424.

against the entire weight of authority, was arrived at per incuriam. Certainly, its conclusion appears to have been sensibly ignored in subsequent cases, as by the Court of Appeal in *London and South of England building Society v. Stone*[35] and again in *Metelmann & Co. N.B.R. (London)*.[36]

(d) A question of fact or a question of law:

In *Payzu v. Saunders*[37] both Bankes and Scrutton L.JJ. said that the question of mitigation of damage is a question of fact; more recently in The Solholt sir John Donaldson M.R. said that "whether a loss is avoidable by reasonable action on the part of the plaintiff is a question of fact not law" and that "this was decided in *Payzu v. Saunders*". One result of this is that, once a court of first instance has decided that there has been, or has not been, a failure to mitigate, it is difficult to persuade an appellate court to come to a different view; The Solholt itself provides a good illustration. Yet what was being referred to in both these cases was whether a plaintiff, required to take all reasonable steps to mitigate his loss if he is to recover for that loss, has or has not failed to do so. Whether there is in the particular circumstances a need to mitigate in the first place will be a question of law.

(e) Need to mitigate before contractual breach:

A plaintiff need take no steps in mitigation until a wrong has been committed against him. Thus the attempt, which is often made, to use the "duty" to mitigate damage to force

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35 *London and South of England building Society v. Stone,* [1983] 1 W.L.R. 1242.

36 *Metelmann & Co. N.B.R. (London),* [1984] 1 Lloyd's Rep. 614.

37 *Payzu v. Saunders,* [1983] 1 W.L.R. 1242, C.A.

upon a party to a contract an acceptance of a repudiation of the contract by the defendant, is misconceived. Where a party to a contract repudiates it, the other party has an option to accept or not to accept the repudiation. If he does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises. On the other hand, if the repudiation is accepted this results in an anticipatory breach of contract in respect of which suit can be brought at once for damages, and, although the measure of damages is still prima facie assessed as from the date when the defendant ought to have performed the contract, this amount is subject to being cut down if the plaintiff fails to mitigate after his acceptance of the repudiation.

These principles are illustrated by sale of goods cases, especially by actions for non-delivery against a repudiating seller, and also, although there are fewer cases, by actions for non-acceptance against a repudiating buyer. Thus on a seller's repudiation when the market was rising, it was held in *Brown v. Muller*[38] that a buyer who had not accepted the repudiation was entitled to claim the normal measure of damages based on the market price at the time of due delivery, there being no need for him to take mitigating steps; in *Roper v. Johnson*,[39] and again in *Garnac Grain Co. v. Faure & Fairclough*,[40] that a buyer who had accepted the repudiation was still entitled to claim the normal measure based on the market price at the time of due delivery, because, although now required to mitigate, it was not shown that he had failed to do so; but in *Melachrino v.*

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38 *Brown v. Muller,* (1872) L.R. 7 Ex. 319; Leigh v. Paterson, (1818) 8 Taunt. 540.

39 *Roper v. Johnson,* (1873) L.R. 8 C.P. 167.

40 *Garnac Grain Co. v. Faure & Fairclough,* [1968] A.C. 1130.

Nickoll[41] it was said that a buyer who had accepted the repudiation was limited to the lower price at which it was shown that he could have bought equivalent goods in the market before the date of due delivery.[42] The same principles apply *mutatis mutandis* where it is the buyer who has repudiated. And the law is illustrated for employment contracts by *Shindler v. Northern Raincoat Co.*[43] where the defendant company, in the course of the plaintiff's employment by them under a 10-year agreement, wrongfully repudiated the contract by informing the plaintiff that they would not continue to require his services as from an apparently unspecified later date, but only removed him from office at an extraordinary general meeting of the company some months after this repudiation. It was held that the plaintiff had no duty to mitigate by accepting alternative offers of employment between the defendants' wrongful repudiation and their removal of him from office because during this period there had been no breach: the plaintiff had not accepted the repudiation and the "defendants had a *locus poenitentiae*". Somewhat similarly in *Abrahams v. Performing Rights Society,*[44] where the contract provided for two years' notice or for payment in lieu of notice, the summary dismissal of the employee was held not to constitute a breach of contract so that the employee was entitled to the payment in lieu without any need to mitigate by taking alternative employment during the two years. By summarily dismissing the plaintiff the defendant was not breaking the contract but electing

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41 *Melachrino v. Nickoll,* [1920] 1 K.B. 693.

42 Kaines v. Osterreichische Warrenhandelsgesellschaft, [1993] 2 Lloyd's Rep. 1 C.A.

43 *Shindler v. Northern Raincoat Co.,* [1960] 1 W.L.R. 1038, Abrahams v. Performing Rights society, [1995] I.C.R. 1028,

44 *Abrahams v. Performing Rights Society,* [1995] I.C.R. 1028,

between two modes of performance, namely serving notice or paying money. His election of the latter meant that the money was due as a debt under the contract and no question of mitigation arose.

(f) Need to mitigate by discontinuing contractual performance:

Nor, it seems, need a plaintiff take steps to mitigate loss, even after the defendant's performance of the contract, which he has repudiated, falls due, by accepting the repudiation and suing for damages. He may instead, where he can do so without the defendant's assistance, perform his side of the contract and claim in debt for the contract price. Even if this involves incurring expense in the performance of the contract, which in face of the defendant's repudiation is rendered useless, the plaintiff is not required to minimize the loss by accepting the repudiation and suing for damages. This conclusion was reached in *White and Carter v. McGregor*.[45] The plaintiffs, advertising agents, contracted with the sales manager of the defendant garage proprietor to display on litter bins advertisements for the defendant's garage for the three years. The defendant, on hearing of the contract, wrote at once to the plaintiffs to cancel it but the plaintiffs refused, displayed the advertisements in accordance with the agreement, and sued for the contract price. The House of Lords, by a majority, held that the plaintiffs were entitled to carry out the contract and claim in debt for the price, and were not obliged to accept the repudiation and sue for damages.

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[45] *White and Carter v. McGregor,* [1962] A.C. 413.

This decision was followed in *Anglo-African Shipping Co. v. Mortner*.[46] The plaintiffs in New York agreed with the defendants in London to act as a confirming house in respect of an order for the purchase of goods by the defendants from American suppliers, and as the defendants' shipping agents in procuring shipment of the goods to the defendants in London. It was further agreed that the defendants, in addition to paying a commission, would reimburse the plaintiffs the price of the goods paid by them under their confirmation of the order and all expenses incurred by them as the defendants' agents. After the plaintiffs had contracted personally with the suppliers to pay them the purchase price of the goods the defendants cancelled their order and then refused to pay the plaintiffs. The suppliers having delivered the goods to the plaintiffs for shipment, the plaintiffs proceeded to ship them to the defendants in London and successfully sued the defendants for the price, expenses and commission. It was held that the plaintiffs were under no duty to mitigate by not shipping the goods once the defendants had said that they did not propose to accept them.

How absolute is the plaintiff's right to ignore repudiation and carry on with performance may yet have to be worked out by the courts. Lord Reid in *White and Carter v. McGregor*[47] said:

"It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden

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46 *Anglo-African Shipping Co. v. Mortner,* [1962] 1 Lloyd's Rep. 81.

47 *White and Carter v. McGregor,* [1962] A.C. 413.

with no benefit to himself. It a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it. And, just as a party is not allowed to enforce a penalty, so he ought not to be allowed to penalize the other party by taking one course when another is equally advantageous to him."

In the case itself the defendant had not attempted to prove that the plaintiff had no legitimate interest in completing performance, and it was improbable, added Lord Reid that any such case could have been made out. In *Anglo-African Shipping Co. v. Mortner*[48] the judge said that the facts of the case before him tended "to show the practical justice" of *White and Carter v. McGregor*;[49] for if the plaintiffs had been required to sell the goods in New York and not ship them to London there would have been 'no doubt, all kinds of arguments thereafter as to whether the plaintiffs had in fact sold them at the best possible price or as to whether they could have sold them in some other market". And, further, the plaintiff might have various sub-contracts for the purpose of performance, e.g. taking shipping space, and if there is a duty to mitigate by accepting repudiation "he would have to cancel those sub-contracts in a way which might be extremely damaging commercially to himself".

Later cases, however, have sought to distinguish *White and Carter v. McGregor*. In *Hounslow London Borough Council*

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48 *Anglo-African Shipping Co. v. Mortner,* [1962] 1 Lloyd's Rep. 81.

49 *White and Carter v. McGregor,* [1962] A.C. 413.

v. Twickenham Garden Developments,[50] Megarry J, on the assumption that the borough council there had wrongfully repudiated a contract for the construction of certain buildings, considered that the building contractors were not entitled to continue construction against the borough council's wishes. And in *Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei*[51] the Curt of Appeal, on the assumption that in a charterparty by demise the charterers' obligation to repair the vessel was a condition precedent to their right to redeliver her to the owners, considered that the owners were not entitled to claim the contract hire until such time as the charterers repaired or redelivered, and reversed the judgment of the court below. While in the Housnslow case Megarry J. adverted to Lord Reid's qualification in *White and Carter v. McGregor*[52] that a contracting party may not be entitled to perform his side of the contract where he has no legitimate interest in doing so, he relied on a further qualification introduced by Lord Reid to the effect that a contracting party may not be able to perform his side of the contract without some degree of intervention on the part of the other contracting party, holding that *White and Carter v. McGregor*[53] had no application to the case before him "first, because a considerable degree of active co-operation under the contract by the borough is requisite, and second, because the work is being done to property of the borough". On the other hand, Orr L.J. in the Attica case relied on both of Lord Reid's qualifications, and in this Browne L.J. agreed with him, while Lord Denning M.R. based himself solely on the

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50 *Hounslow London Borough Council v. Twickenham Garden Developments,* [1971] Ch. 233.

51 *Attica Sea Carriers Corporation v. Ferrostaal Poseidon Bulk Reederei,* [1976] 1 Lloyd's Rep. 250, C.A.

52 *White and Carter v. McGregor,* [1962] A.C. 413.

53 *White and Carter v. McGregor,* [1962] A.C. 413.

qualification as to legitimate interest. He considered that *White and Carter v. McGregor*[54] "has no application whatever in a case where the plaintiff ought, in all reason, to accept the repudiation and sue for damages – provided that damages would provide and adequate remedy for any loss suffered by him. The reason is because, in suing for the money, the plaintiff is seeking to enforce specific performance of the contract – and he should not be allowed to do so when damages would be an adequate remedy". That the plaintiffs ought, in all reason, to sue for damages was undoubtedly so in the case before the Court of Appeal because, in Lord Denning M.R.'s words, "it would be economic nonsense to go to the expense of repairing" the vessel; not only would the repairs have cost twice as much as the ship would be able to sell her only as scrap.

(1) The rule and its relationship to the normal measure of damages:

Apart from cases in which the plaintiff's opportunity of mitigating has arisen through the possibility of further negotiation with, and in particular through an offer made by, the defendant himself, there is no well-known decision, which illustrates the rule that mitigable loss is not recoverable.[55] The reason for this is that either the court has held that the plaintiff has not failed to mitigate the loss so that he recovers in respect of the whole damage, or, probably more commonly, the issue has never reached the point of litigation because the plaintiff has in his own interests taken the necessary steps to mitigate. Indeed, so clear is the way of mitigation in many cases that it often tends to become incorporated into the normal measure of

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54 *White and Carter v. McGregor,* [1962] A.C. 413.

55 *Simson v. Pawsons & Leafs,* (19330 38 Com. Cas. 151, C.A.

damages. When this happens it loses its identity and does not expressly appear as a separate issue.[56]

Such a situation arises particularly in cases of sale of goods. Thus, if a seller fails to deliver the goods contracted for, the buyer cannot sit back on a rising market or wait until his sub-sale to a third party has fallen through, but must go into the market with all reasonable speed an buy equivalent goods there. This mitigating step is incorporated into the normal measure of damages by section 51 (3) of the Sale of Goods Act, 1979, which provides that in an action for non-delivery the measure of damages, where there is an available market for the goods in question, is prima facie to be ascertained by the difference between the contract price and the market price at the time the goods ought to have been delivered. Conversely, if a buyer of goods fails to accept them, the seller must take steps to resell them to another and not sit back on a falling market.[57] This, similarly, is incorporated into the normal measure of damages by section 50(3) of the Sale of Goods Act, 1979, which provides that in an action for non-acceptance the measure of damages, where there is an available market for the goods in question, is prima facie to be ascertained by the difference between the contract price and the market price at the time the goods ought to have been accepted. On the other hand, in contracts involving the rendering of services and the non-acceptance of these services as the breach, although it is clear that the plaintiff must try to sell his services elsewhere, this mitigating step may not yet have become finally incorporated into the normal measure of damages. This is so both in contracts of hiring and in

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56 *Cf. Compania Financiera "Soleada" v. hamoor Tanker Corpn, The Borag,* [1981] 1 W.L.R. 274.

57 *Dunkirk Colliery Co. v. Lever,* (1878) 9 Ch.D. 20, C.A.

contracts of carriage. The fullest statement of the normal measure of damages for wrongful dismissal is that of Erle C.J. in *Beckham v. Drake*.[58] He said: "The measure of damages for the breach of promise now in question is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that it is the duty of the servant to sue diligence to find another employment." Similarly, the normal measure for failure to supply cargo for carriage is stated by Kay L.J. in *Aitken Lilburn v. Ernsthausen*[59] thus: "The general rule is, that when such a breach by non-delivery or [i.e. failure to supply] cargo occurs the owners are entitled to damages to the amount of the freight thereby lost. But if they fill up the ship on their own account, the amount of freight so earned goes in reduction of such damages." Yet for A.l. Smith L.J. in the same case the normal measure of damages was "the difference between the charterparty freight and the net freight actually earned, after deducting expenses". The correct trend in these cases, it is submitted, is towards the incorporation of the normal mitigating step into the normal measure of damages.[60]

However, it is important to be certain of what the normal measure of damages is, before deciding what form of mitigation is properly incorporated within it. Particularly

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58 *Beckham v. Drake,* (1840) 2 H.L.C. 579.
59 *Aitken Lilburn v. Ernsthausen,* [1894] 1 Q.B. 773., C.A.
60 *London building Society v. Stone,* [1983] 1 W.L.R. 1242, C.A.

instructive is a comparison of the normal measure of damages where goods sold are not delivered in breach of contract and of the normal measure where goods are misappropriated. In the case of sale of goods the buyer must go into the market for a replacement, or at least cannot sit back on a rising market and then claim damages on the basis of the increased price: but no such step towards replacement need be taken by the victim of a misappropriation.

This is made particularly clear by the Court of Appeal decision in *Rosenthal v. Alderton*.[61] This established that a plaintiff suing in the former detinue was entitled to claim, in the absence of a return of the property, the market price at the time of the judgment; thus any rise in the market price between detention and judgment was at risk of the defendant. Only if the plaintiff unduly delayed his action on a rising market would the damages be less than the market price at the time of judgment, as the failure to sue within a reasonable time was a failure to mitigate. Now detinue has been abolished and superseded by conversion, but the result is the same in conversion though admittedly reached by a different route. The normal measure is taken to be not the value of the goods at the time of judgment but their value at the time of conversion, and to this there is added as consequential loss any market increase in value between then and the earliest time that the action could have been brought to trial. This proposition appears to be established for conversion by the Court of Appeal decision in *Sachs v. Miklos*,[62] which permitted a plaintiff to recover at the end of the Second World War the market value of goods converted

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61 *Rosenthal v. Alderton,* [1946] K.b. 374, C.A.

62 *Sachs v. Miklos,* [1948] 2 K.b. 23, C.A.; Hall v. Barclay, [1973] 3 All ER 620, C.A.

near the beginning of the war, this value being greatly increased during the war years, provided that he neither knew nor ought to have known of the conversion during this period and provided also that there was not undue delay in his bringing an action after knowledge. However, although neither in detinue did, nor in conversion does, the plaintiff fail at his peril to replace on a rising market, he must accept redelivery of the goods if offered by the defendant at trial, provided the goods are still in the same condition. This followed naturally in the case of detinue, which was primarily an action claiming redelivery rather than damages, but it was also established for conversion from the time of *Fisher v. Prince*,[63] decided in 1762. This power of the court to stay the proceedings where the goods are brought into court and the plaintiff refuses to accept them does not indeed result in a smaller recovery for him: he merely is compelled to take specific restitution in lieu of damages.

The reason for basing the damages for failure to deliver goods in breach of contract, but not the damages for misappropriation of goods, upon the assumption of replacement may be that in the case of contract the plaintiff will generally still have available for purchasing a replacement in the market the money with which he had intended to pay the price. From this reasoning it would follow that even in contract a plaintiff should not be restricted in his damages by reason of an assumption of replacement of the goods if he has already paid the contract price for them to the defendant. Indirect support for this view is given in a number of cases. Thus, in *Gainsford v. Carroll*[64] the plaintiff's contention that the damages for non-deliver of goods sold should be the market price at the time

63 *Fisher v. Prince,* 91762) 3 Bur. 1363.
64 *Gainsford v. Carroll,* 91824) 2 B. & C. 624.

of trial was rejected on the ground that he still had the money on breach with which he had intended to pay the purchase price. In *Shaw v. Holland,*[65] an equivalent case of non-delivery of shares sold, the court rejected the time of trial as the time that the market price should be taken, as "the plaintiff had his money in his own possession, might have gone into the market and bought other shares as soon as the contract was broken". In *Barrow v. Arnaud,*[66] where the defendant collector of customs was being sued by the plaintiff for refusing to sign a bill of entry for his corn under a claim of customs duty, the plaintiff recovered for the loss he suffered by reason of a fall in the market, the court pointing out that he might not have had any money to pay the defendant the customs duty demanded. These cases generally make reference to actions for not replacing stock, where similarly it has been held, as in *Shepherd v. Johnson,*[67] that the plaintiff is entitled to recover the market value to which the stock has risen between the time of the wrong and the time of the trial, because the defendant here holds the plaintiff's money and thus prevents him from using it. Yet when it came to the test in a sale of goods case in which the purchase price had been partially prepaid, it was held in *Startup v. Cortazzi*[68] that the plaintiff still should have replaced. Whether this is basically consistent with the dicta in and rationale of the above sale fo goods and shares cases, and with the decisions in actions for not replacing stock, may be doubted. It is, indeed, encouraging to see that the door is not closed to rejection of the view embodied

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65 *Shaw v. Holland,* (1846) 15 M. & W. 136.
66 *Barrow v. Arnaud,* (1846) 8 Q.B. 595.
67 *Shepherd v. Johnson,* (1802) 2 East 211.
68 *Startup v. Cortazzi,* (1835) 2 C.M. & R. 165.

in *Startup v. Cortazzi*[69] for Atkin L.J. in *Aronson v. Mologa Holzindustrie*[70] treated the matter as an open point.

At the other end of the scale from the problem that mitigating steps cannot be incorporated into the normal measure till it is known what the normal measure is, is the problem, which arises once the normal measure with built-in mitigating step has been established, of whether this step has indeed cut down the loss, since there are certain cases in which such cutting down is only apparent and not real. This is especially so in cases where the defendant has in breach of contract failed to accept goods which the plaintiff has sold him as in *Thompson v. Robinson,*[71] or has manufactured and supplied to him as in *Re Vic Mill,*[72] or has hired to him as in *Interoffice Telephones v. Freeman*.[73] In all these cases the plaintiff had indeed succeeded in selling, supplying or hiring the goods in question to a third party at a similar profit to that which he would have made under his contract with the plaintiff, and in each case it was contended by the defendant that he had thereby avoided any loss and was, therefore, not entitled to more than nominal damages. This contention, however, ignored the fact that the state of the market was such that the plaintiff would have been able to make such a contract with a third party even if the defendant had carried out his. In the words of Hamilton L.J. in *Re Vic Mill*,[74] "the fallacy ... is in supposing that the second customer was a substituted customer, that, had all gone well, and makers would not

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69 *Startup v. Cortazzi,* (1835) 2 C.M. & R. 165.
70 *Aronson v. Mologa Holzindustrie,* (1927) 32 Com. Cas. 276, C.A.
71 *Thompson v. Robinson,* [1955] Ch. 177.
72 *Re Vic Mill,* [1913] 1 Ch. 465, C.A.
73 *Interoffice Telephones v. Freeman,* [1958] 1 Q.B. 190, C.A.
74 *Re Vic Mill,* [1913] 1 Ch. 465, C.A.

have had both customers, both orders, and both profits". If, on the other had, the state of the market or the state of the defendant's manufacturing facilities was such that demand exceeded supply, the contract made with the third party would be a substituted contract, the loss would be avoided and damages would therefore be nominal: this was the position in *Charter v. Sullivan*[75] which represents, in relation to the sale of cars, the converse of *Thompson v. Robinson*.[76]

The same situation arises in cases of non-acceptance by the defendant of the plaintiff's services. The fact that the plaintiff has made a similar service contract does not necessarily entail that he has avoided the loss. He will not have done so if he would have been capable of carrying out both contracts simultaneously, as well very frequently be the case where the plaintiff, especially if a company, would perform the contract by employing others to do the actual work. If, on the other hand, the defendant has bargained for the plaintiff's exclusive services, any other service contract made by the plaintiff on the defendant's breach will be a substituted contract, and the benefit derived from it will be taken into account in assessing damages against the defendant.

(2) Illustrations of circumstances in which there is no recovery for loss that should have been avoided:

(i) In case of breach of contract where the opportunity of mitigating has arisen through an officer of the defendant himself, the general rule refusing recovery for mitigable loss

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75 *Charter v. Sullivan,* [1957] 2 Q.B. 117, C.A.

76 *Thompson v. Robinson,* [1955] Ch. 177; Lazenby Garages v. Wright, [1976] 1 W.L.R. 459, C.A.

is sparsely illustrated. In *Simon v. Pawsons & Leafs*[77] the plaintiff ordered certain material from the defendant which the defendant promised to stock for her but failed to do so. The result of the plaintiff's not obtaining the material from the defendant was that she lost an appointment as maker of school clothes to a school. The Court of Appeal refused damages to her for her loss of this appointment because, *inter alia*, she had had ample opportunity after she learnt of the defendant's breach in failing to stock material for her, to buy equivalent material elsewhere but had made no attempt to do so. In *Tucker v. Linger,*[78] where a landlord in breach in failing to supply materials to the tenant with which to repair the premises, the tenant failed to recover for damage caused to his crops in his barn by bad weather because the barn was out of repair, since he ought to have provided himself with the necessary materials and done the repair, and charged the landlord with the price of the materials. And where a tenant failed to give notice to his landlord of disrepair, so that the landlord took no action and the disrepair, and with it the discomfort and inconvenience to the tenant, were allowed to continue, this failure was held to be a failure to mitigate in *Minchburn v. Peck*.[79] It was thus the damages for non-pecuniary loss that were reduced; the trial judge's view, causing him to make no reduction in his award, that the doctrine of mitigation was confined to commercial contracts and did not apply as between landlord and tenant, was rejected without difficulty by the Court of Appeal.

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77 *Simon v. Pawsons & Leafs,* (1933) 38 Com. Cas. 151, C.A.

78 *Tucker v. Linger,* (18820 21 Ch.D. 18.

79 *Minchburn v. Peck,* (1988) 20 H.L.R. 392, C.A.; Topfer v. Warinco A.G., [1978] 2 Lloyd's Rep. 569.

(ii) Where the opportunity of mitigating has arisen through the possibility of further negotiation with, and in particular through an offer made by, the party in breach himself. There is more ample authority for the proposition that the door to mitigation may be opened by the party in breach himself. In *Payzu V. Saunders,*[80] the leading case on non-recoverable mitigable loss, Scrutton L.J. stated that counsel's contention that "in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded" was contrary to his experience. Yet it was held in *Strutt v. Whitnell*[81] that a buyer of land, suing his seller after conveyance because he was unable to obtain vacant possession on account of a tenant refusing to leave, was not required, in mitigation of damage, to accept the offer of the seller to repurchase the land at the contract price. Submitting to the undoing of the contract and giving up his remedy in damages entirely was said not to be called for, however, capricious the election to retain that remedy might be. In contrast to this, in *The Solholt,*[82] where delivery a day late by the sellers of a ship gave the buyers a right of cancellation which they exercised although the market value of the ship at the time had appreciated by $500,000 over the contract price, the court refused to award this amount, which represented the normal measure of damages, or indeed any amount to the buyers because they had failed to mitigate their loss by negotiating a further contract for the purchase of the ship at the original contract price, the judge below having found that such an offer, if made to the sellers, would have been accepted by them. The Court of Appeal was bound both by the decision

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80 *Payzu V. Saunders,* [1919] 2 K.B. 581, C.A.
81 *Strutt v. Whitnell,* [1975] 1 W.L.R. 870, C.A.
82 *The Solholt,* [1983] 1 Lloyd's Rep. 605, C.A.

in *Payzu v. Saunders*[83] and that in *Strutt v. Whitnell*[84] but was rightly sceptical about the latter, reconciling it with the former only "by treating it as a decision turning on reasonableness and its own special facts". Sir John Donaldson M.R. commented:

"If the House of Lords ever had to consider the decision, it might well hold that the judgments totally confuse the proposition that in deciding whether to rescind or affirm a contract the innocent party need have no regard to considerations of mitigation of loss with the proposition that, having made such an election, he will be able to recover such loss as was unavoidable following that election and that in some, perhaps exceptional, circumstances it may be reasonable at a stage after the decision to rescind or affirm the contract to adopt a course of action which will nullify the effect of that decision.".

The authorities deal with two types of contract: contracts of sale and contracts of service. As to contracts of sale, in *Payzu v. Saunders*[85] the defendant sold goods to the plaintiff, which was to be delivered in nine monthly instalments and which was to be paid for within one month of each delivery less 2.5 per cent discount. The plaintiff failed to make punctual payment on the first instalment and the defendant, in the bona fide but erroneous belief that the non-payment was due to the plaintiff's insolvency, refused in breach of contract to delivery any further instalments on the arranged credit. He offered to deliver to the plaintiff at the contract price against cash, an offer refused, on a rising market, by the plaintiff. It was held that the plaintiff should

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83 *Payzu V. Saunders,* [1919] 2 K.B. 581, C.A.
84 *Strutt v. Whitnell,* [1975] 1 W.L.R. 870, C.A.
85 *Payzu V. Saunders,* [1919] 2 K.B. 581, C.A.

have mitigated his loss by accepting this offer and that; therefore, his damages were limited to what he would have suffered had he accepted it, which would have been only the loss of the useful period of credit. Similarly, in *Houndsditch Warehouse Co. v. Waltex,*[86] the seller, who was in breach of warranty of quality, offered to take back the goods and to pay the contract price for them; it was held that the buyer should have accepted this offer to mitigate his loss and that the damages must be reduced accordingly.[87] And the further sale cases of *Strutt v. Whitnall*[88] and *The Solholt,*[89] concerning land and goods respectively, have already been considered. As to contract of service, in *Brace v. Calder*[90] two persons out of a partnership of four employing, the plaintiff resigned from the partnership, this operating as a technical dismissal of the plaintiff. The remaining two, however, offered to keep him on in his employment, but he refused this offer. It was held that he should have accepted it in mitigation and he was awarded only nominal damages. And in *Barners v. Port of London Authority*[91] where the plaintiff workman, injured by his employer's negligence, refused an offer by the defendant employer of suitable alternative work, he was held entitled to special damages for loss of wages only up to the time of such offer.[92]

Not every offer of the party in default in such contract will be refused at the plaintiff's peril: this is particularly true

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86 *Houndsditch Warehouse Co. v. Waltex,* [1944] K.B. 579.
87 *Heaven & Kesterton v. Etablissements Francois Albiac,* [1956] 2 Lloyd's Reo. 316.
88 *Strutt v. Whitnall,* [1975] 1 W.L.R. 870, C.A.
89 *The Solholt,* [1983] 1 Lloyd's Rep. 605, C.A.
90 *Brace v. Calder,* [1895] 2 Q.B. 253, C.A.
91 *Barners v. Port of London Authority,* [1957] 1 Lloyd's Rep. 486.
92 *Anset v. Marshall*, (1853) 22 L.J. Q.B. 118

with a contract of service. Thus in *Payzu v. Saunders*[93] Bankes L.J. said:

"There may be cases where as matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer, and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal."

And Scrutton L.J. pointed a contrast between service contracts and commercial contracts, saying:

"In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default."

These principles are illustrated by *Shindler v. Northern Raincoat Co.*[94] and by *Yetton v. Eastwoods Froy*.[95] In former the plaintiff, suing for wrongful dismissal, was held not to have acted unreasonably in refusing other offers of employment from the defendant company, primarily because these offers, if accepted, would have entailed his acting under the direction of persons with whom he had quarreled

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93 *Payzu V. Saunders,* [1919] 2 K.B. 581, C.A.
94 *Shindler v. Northern Raincoat Co.,* [1960] 1 W.L.R. 1038.
95 *Yetton v. Eastwoods Froy,* [1967] 1 W.L.R. 104.

in the course of the dispute over his dismissal[96]; moreover, one of the offers had been made on the terms that the plaintiff should not act on his legal rights against the defendant company for damages for breach of contract. In the latter the plaintiff, dismissed as Managing Director of the defendant company, was held not to have acted unreasonably in refusing the defendant's offer of employment as Assistant Managing Director, partly because this would have marked a significant step down in status and partly because the dismissal had taken place in an arbitrary and high-handed fashion.[97] Somewhat similarly, in a converse case of servants' refusing to work and subsequently offering to do so, it was held in *Bowes v. Press*[98] that the employer's damages were not to be reduced on account of his refusal of this offer, for its acceptance would virtually have involved allowing the defendants to work under other than the contractual conditions.

(3) Standard of conduct which the plaintiff must attain when assessing what steps should have been taken by him:

Although the plaintiff must act with the defendant's as well as with his own interests in mind,[99] he is only required to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is an admitted

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96 *Brace v. Calder,* [1895] 2 Q.B. 253, C.A.; *Payzu V. Saunders,* [1919] 2 K.B. 581, C.A.

97 *Clayton-Greene v. de Courville,* 91920) 36 T.L.R. 790; *Edwards v. Society of Graphical & Allied Trades,* [1970] 1 W.l.R. 379; *Basnett v. J & A Jackson,* [1976] I.C.R. 63.

98 *Bowes v. Press,* [1894] 1 Q.B. 202, C.A.

99 *Smailes v. Hans Dessen,* (19050 L.T. 492; *Darbishire v. Warran,* [1963] 1 W.L.r. 1067, C.A.; *Harlow and Jones v. Panex (International),* [1967] 2 Lloyd's Rep. 509; *Metelmann & Co. v. N.B.R. (London),* [1984] 1 Lloyd's Rep. 614, C.A.

wrongdoer. Lord Macmillan put this point well for contract in *Banco de Portugal v. Waterlow*[100] in the following words:

"Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps, which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."[101]

Whether the plaintiff has acted reasonably is in every case a question of fact, not of law.

The criterion stated concisely in the words of James L.J. in *Dunkirk Colliery Co. v. Lever,*[102] which were cited with approval by *Viscount Haldane in British Westinghouse Co. v. Underground Ry,*[103] is that the plaintiff is not "under any obligation to do anything other than in the ordinary course

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100 *Banco de Portugal v. Waterlow,* [1932] A.C. 452.

101 *Bacon v. Cooper (Metals),* [1982] 1 All ER 397; *Harlow and Jones v. Panex (International),* [1967] 2 Lloyd's Rep. 509; *Hayes v. James & Charles Dodd,* [1990] 2 All ER 815, C.A.

102 *Dunkirk Colliery Co. v. Lever, (*1878) 9 Ch.D. 20, C.A.

103 *Viscount Haldane in British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.

of business". This terminology, with its reference is geared to contract, it is probably better, to speak simply of the ordinary course or of the ordinary course of events. The illustrative decisions practically all go to show what the plaintiff need not do in order to come up to the required standard: this in itself suggests that the standard is not a demanding one. Nine such rules can be extracted from the cases.

(I) A plaintiff need not risk his money too far. In *Lesters Leather and Skin Co. v. Home and Overseas Brokers*[104] the plaintiff bought snakeskins from the defendant to be delivered at a United Kingdom port, and properly rejected them on their arrival as being not merchantable. The Court of Appeal awarded the plaintiff damages for his loss of profit, rejecting the defendant's argument that the plaintiff should have mitigated by buying skins available in India on the ground that this was a risk, which he was not bound to take. Singleton L.J. quoted Sellers J.'s remark at first instance that "it is one thing to enter into a contract. It would be another thing to have got the goods actually here". And Lord Goddard C.J. said: "I cannot say that the buyers are bound to go hunting the globe to find out where they can get skins." Similarly, in *Jewelowski v. Propp*,[105] where the plaintiff was induced by the defendant's fraudulent misrepresentation to advance money on a debenture to a company which later went into liquidation, it was said that he could not be required to buy the company's assets so that, by reselling them afterwards at a higher amount than he paid for them, he would reduce his loss. Lewis J. said that a plaintiff "cannot be called on to

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104 *Lesters Leather and Skin Co. v. Home and Overseas Brokers,* (1948) 64 T.L.R. 569, C.A.

105 *Jewelowski v. Propp,* [1944] K.B. 510.

spend money[106] to enable him to minimize the damages"; this would be "going far beyond the rule".

(II) A plaintiff need not risk his person too far in the hands of surgeons. In *Steele v. Robert George*[107] and again in *Richardson v. Redpath,*[108] both workmen's compensation claims, the House of Lords, and in *Selvanayagam v. University of the West Indies,*[109] a damages claim, the Judicial Committee of the Privy Council, held on the facts before them that the refusal of a physically injured plaintiff to undergo a dangerous and risky surgical operation did not constitute a failure to mitigate; and the same was held of the refusal in *Savage v. Wallis*[110] of a slight operation where medical evidence was evenly balanced on the prospects of its success. On the other hand, where the operation would not be regarded by reasonable men as a risky one, then a refusal to allow it will be a failure to mitigate on the part of the plaintiff; such a result was reached by the Court of Appeal in *Marcroft v. Scruttons*[111] and again in *McAuley v. London Transport Executive.*[112]

(III) A plaintiff need not have an abortion to end an unwanted pregnancy. This in *Emeh v. Kensington Area Health Authority,*[113] where the defendants had performed a sterilization operation on the plaintiff, a mother of three

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106 *cf. Tucker v. Linger,* (1882) 21 Ch.D. 18; *cf. McAuley v. London Transport Executive,* [1957] 2 Lloyd's Rep. 500, C.A.

107 *Steele v. Robert George* , [1942] A.C. 497.

108 *Richardson v. Redpath,*[1944] A.C. 62.

109 *Selvanayagam v. University of the West Indies,* [1983] 1 W.L.R. 585, P.C.

110 *Savage v. Wallis,* [1966] 1 Lloyd's Rep. 357, C.A.

111 *Marcroft v. Scruttons,* [1954] 1 Lloyd's Rep. 395, C.A.

112 *McAuley v. London Transport Executive,* [1957] 2 Lloyd's Rep. 500, C.A.; Morgon v. T. Wallis, [1974] 1 Lloyd's Rep. 165, C.A.; Xenox v. Curnow, (1975) 12 S.A.S.R. 301.

113 *Emeh v. Kensington Area Health Authority,* [1985] Q.B. 1012, C.A.

children, with the result that later found herself once again pregnant, she was held entitled to recover *inter alia* for her own loss of future earnings and for maintenance of the child, and the court would have none of the defendants' argument that these losses were the plaintiff's responsibility as they stemmed from her own decision not to have an abortion. Slade L.J. said that "save in the most exceptional circumstances, I cannot think it right that the court should ever declare it unreasonable for a woman to decline to have an abortion in a case where there is no evidence that there were any medical or psychiatric grounds for terminating the particular pregnancy". This is somewhat akin to the cases under the second rule, and indeed Slade L.J. pointed to the fact that the operation to terminate the plaintiff's pregnancy "would not have been entirely without risk, and no doubt would have involved her in considerable pain and discomfort". Since *Emeh* claims arising out of failed sterilizations have become quite common and it has been accepted in all of these, where the precise measure of damages in relation to bringing up the child has been the issue, that the decision to have the child rather than undergo an abortion was not a failure to mitigate.[114]

(IV) A plaintiff need not take the risk of starting an uncertain litigation against a third party. Thus in *Pilkington v. Wood*[115] the plaintiff bought freehold land from a seller who purported to convey the property as beneficial owner, the defendant acting as the plaintiff's solicitor in the transaction. When the plaintiff later tried to sell the property he found the title was defective, since the seller was trustee of the property and has committed a breach of trust in buying it himself. In the plaintiff's action against the

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114 *Allen v. Bloomsbury Health Authority,* [1993] 1 All ER 651.
115 *Pilkington v. Wood,* [1953] Ch. 770.

defendant solicitor for negligence, the latter contended that before suing him the plaintiff ought to have mitigated his damage by suing the seller on an implied covenant of title. This contention was rejected by Harman J. because, even conceding that the defendant had offered an adequate indemnity against costs in an action against the seller and that the seller was solvent and therefore worth suing, it was not clear that the plaintiff had a good *prima facie* right of action against the seller. The judge stated that he was of the opinion that "the so-called duty of mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party".[116]

(V) A plaintiff need not destroy or sacrifice rights or property of his own. This point was put with characteristic clarity by Scrutton L.J. in *Elliott Steam Tug Co. v. Shipping Controller*.[117] The plaintiffs chartered a tug from the owners entitling them to the tug's services until they should give 14 days' notice determining the charterparty. In the course of this contract the tug was requisitioned by the Admiralty, from whom the plaintiffs proceeded to claim statutory compensation under two heads, namely fro the amount of hire for which they continued liable under the charterparty, and for loss of profits. The tribunal, allowing compensation for only 30 days under each head, said that the plaintiffs should have minimized their loss by determining the charterparty and gave them the 30 days in which to have done so. Unfortunately there was no appeal to the Court of Appeal on the first head, but Scrutton L.J. stated his

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116 *Cf. British Racing Drivers' Club v. Hextall Erskine & Co.,* [1996] P.N.L.R. 523.

117 *Elliott Steam Tug Co. v. Shipping Controller,* [1922] 1 K.B. 127, C.A.

disagreement with the tribunal on it. “At common law”, he said:

“the owner of a ship whiled under a duty to act reasonably to reduce damages is under no obligation to destroy his own property to reduce the damages payable by the wrongdoer. The leasehold tenant of a house would not be bound to stop paying rent to his superior landlord during the period during which a wrongdoer prevented him using the house, because by so doing he would reduce the damages the wrongdoer had to pay if by so doing he lost the tenancy of the house after the wrong was repaired, or finished in its effect. It is common practice at common law to recover, (1) net profits lost; (2) standing charges which have reasonably to be incurred and which are not made up by profits by reason of the wrongdoer’s action. In other words in a case of temporary loss of a chattel, gross profits lost are recovered so far as expenses of earning them reasonably continue; and the reasonableness is from the point of view of the owner of the chattel. If the expenses cease their amount is set off against the gross profit otherwise lost.”

But the situation was different in *Weir v. Dobell*[118] where the defendant sub-charted a ship from the plaintiff for a particular voyage at a rate higher than the plaintiff had to pay under the head charterparty, which was for the same voyage and which, in the events that happened, the plaintiff had a right to cancel. In these circumstances it was held, when the defendant refused to load, that the plaintiff was under an obligation to exercise his right to cancel the head charterparty in mitigation of damage. Here the vital factors were that the two charterparties were co-extensive and that

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118 *Weir v. Dobell,* [1916] 1 K.B. 722.

there was no residue of the head charterparty following on the termination of the sub-charterparty to preserve.

(VI) A plaintiff need not take steps to recover compensation for his loss from parties who, in addition to the defendant, are liable to him. This is an undoubted principle: indeed without such a principle it would have been unnecessary for the legislature to make provision for contribution and indemnity.[119] And *The Liverpool (No.2)*[120] shows that, even if the third party offers payment of the amount for which he is liable, the plaintiff is not required to accept it in mitigation. In that case the defendants' ship through negligence came into collision in port with another ship, which sank. The plaintiff harbour board sued the defendants, whose liability was limited, for expense incurred and damage sustained in clearing the port of the wreck. However, the plaintiffs had also taken steps to enforce their statutory right against the owners of the wreck to recover from them any expenses outstanding after raising and selling the wreck, and not only had this amount been established but the money had been tendered, refused by the plaintiffs, and then put on deposit by the owners of the wreck. In such circumstances the Court of Appeal held that the plaintiffs were under no duty to satisfy part of their damages by accepting the money already on deposit. Harman L.J., delivering the Court's judgment, pointed to the analogy that "it has never been the law that a creditor having a security against a third party for his debt must give credit for that when proving in the bankruptcy".

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119 *The Liverpool (No.2),* [1963] P. 64, C.A., at 83.
120 *The Liverpool (No.2),* [1963] P. 64, C.A.

(VII) A plaintiff need not prejudice his commercial reputation. Thus, in *Finlay v. Kwik Hoo Tong*[121] the plaintiffs had bought goods for August shipment to them by the defendants and had resold them on different terms, the contract of resale, unlike the contract of sale, providing that the date of the bill of lading should be conclusive evidence of the date of shipment. The goods were not shipped by the defendants until September, but the bills of lading bore an August date. The plaintiffs could have wiped out their loss by forcing the goods on their sub-buyers, but to enforce their legal rights in the circumstances would have injured their commercial reputation, and they refused to do so. It was held that their refusal was reasonable and not a failure to mitigate. Similar, but in the context of the charterning and sub-chartering of a ship by the plaintiffs, is *The Lily Prima*.[122] And on the notorious facts of *Banco de Portugal v. Waterlow,*[123] where there had been a large issue of forged bank noted printed by the defendant, it was held by the House of Lords that the plaintiff bank was entitled to give genuine notes in exchange for forged ones in order to protect its own credit and the national currency, and to claim from the defendant as damages for breach of contract the market value of the genuine notes given in exchange and the cost of printing the genuine notes withdrawn from circulation.[124]

(VIII) a plaintiff need not act so as to injure innocent persons. *Banco de Portugal v. Watelow,*[125] just considered, also illustrates this, since the bank was held entitled to give

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121 *Finlay v. Kwik Hoo Tong,* [1929] 1 K.B. 400, C.A.
122 *The Lily Prima,* [1976] 2 Lloyd's Rep. 487.
123 *Banco de Portugal v. Waterlow,* [1932] A.C. 452.
124 *Finlay v. Kwik Hoo Tong,* [1929] 1 K.B. 400, C.A.; *H.L. Motorworks v. Alwahbi,* [1977] R.T.R. 276, C.A.
125 *Banco de Portugal v. Waterlow,* [1932] A.C. 452.

genuine notes for forged ones not only to protect itself but also in protection of innocent holders of forged notes.

(IX) A plaintiff will not be prejudiced by his financial inability to take steps in mitigation. As Lord Collins said in *Clippens Oil Co. v. Edinburgh and District Water Trustees*[126]:

"In may opinion the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his wrongful act."

What is particularly interesting is that in the famous case on remoteness of damage, *Liesbosch Dredger v. S.S. Edison,*[127] Lord Wright cited this dictum of Lord Collins and concluded that it was not in point since it was "dealing not with the measure of damage, but with the victim's duty to minimize damage, which is quite a different matter". He cast no doubt on its correctness however,[128] and it has since been applied in *Robbins of Putney v. Meek,*[129] a claim for non-acceptance of goods sold, where the prince at which the plaintiff resold the goods was used in the calculation of his damages despite the fact that impecuniosity had forced him to dispose of the goods by what in normal circumstances would have been a premature sale. Also, in both *Martindale v. Duncan*[130] and *Bunclark v. Hertfordshire*

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126 *Clippens Oil Co. v. Edinburgh and District Water Trustees,* [1907] A.C. 291 at 303.

127 *Liesbosch Dredger v. S.S. Edison,* [1933] A.C. 449.

128 *Cf. Dodd Properties v. Canterbury City Council,* [1980] 1 W.L.R. 433*; Compania Financiera "Soleada" v. Hamoor Tanker Corpn, The Borag,* [1981] 1 W.L.R. 274, C.A.

129 *Robbins of Putney v. Meek,* [1971] R.T.R. 345.

130 *Martindale v. Duncan,* [1973] 1 W.R. 574, C.A.

C.C.[131] impecuniosity was held to justify the plaintiff's delay in carrying out repairs, in the one case to his car and in the other to his flat, again by an application, in the latter case, of Lord Collins's dictum. Particularly important is the decision of the Court of Appeal in *Dodd Properties v. Canterbury City Council*[132] awarding to the plaintiffs, claiming in nuisance for the cost of repair of their building damaged by the defendants' pile-driving operations, damages based upon the much higher cost of repair at the time of action which was heard some ten years after the damage had been done. Megaw L.J. said:

"Once it is accepted that the plaintiff was not in any breach of any duty owed by him to the defendant in failing to carry out repairs earlier than the time when it was reasonable for the repairs to be put in hand, this becomes, for all practical purposes, if not in theory, equated with a plaintiff's ordinary duty to mitigate his damages."

Accordingly, Lord Collins's dictum in *Clippens,*[133] accepted by lord Wright in *The Liesbosch,*[134] takes over; with this Donaldson L.J. agreed. However, the decision for the plaintiff in that case was reached in terms of remoteness as much as in terms of mitigation, and it is thought that the precise point at which the dictum in *Clippens*[135] takes over from the decision in *Liesbosch*[136] may still have to be worked out.

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131 *Bunclark v. Hertfordshire C.C.,* (1977) 234 E.G. 381 and 455.
132 *Dodd Properties v. Canterbury City Council,* [1980] 1 W.L.R. 433, C.A.
133 *Clippens,* [1907] A.C. 291 at 303.
134 *The Liesbosch,* [1933] A.C. 449.
135 *Clippens,* [1907] A.C. 291 at 303.
136 *The Liesbosch,* [1933] A.C. 449.

11.8 THE COROLLARY: RECOVERY FOR LOSS INCURRED IN ATTEMPTS TO MITIGATE THE DAMAGE:

The plaintiff, during his efforts to mitigate the damage, may incur further loss, which will often be a loss which is not in addition to, but in place of and less than, the loss which he is attempting to mitigate. This is particularly so in the case of expenses. The expenses incurred by the plaintiff as the result of the breach of contract for which recover is allowed in the cases are generally expenses incurred to avoid or minimize a loss. This is so where money is laid out in acquiring or hiring a substitute where the plaintiff's property is damaged, destroyed or misappropriated[137]; where medical expenses are incurred to ameliorate the plaintiff's physical injury caused by the defendant[138]; where there is expenditure upon advertisements to counteract the effect of the defendant's infringement of the plaintiff's trade mark, [139] or upon extensive inquires to detect the extent of the defendant's unlawful machinations in inducing breaches of contract and in conspiracy.[140] These various examples may be considered as examples of steps taken in mitigation of damage, but some of them are so common, such as medical expenses in personal injury cases, that they tend not to be thought of specifically from this angle.[141] Whether regarded specifically as mitigation or not, the rule allowing recovery for such expenses is at base the corollary of the rule refusing recovery for loss that could reasonably have been mitigated.

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137 *Davis v. Oswell*, (1837) 7 C.& P. 804 (conversion); *Moore v. D.E.R.,* [1971] 1 W.L.R. 1476, C.A. (destruction); *Bacon v. Cooper (Metals)*, [1982] 1 All ER 397.

138 *S. v. Distillers Co. (Biochemicals),* [1970] 1 W.L.R. 114.

139 *Spalding v. Gamage,* (1918) 35 R.P.C. 101, C.A.

140 *British Motor Trade Association v. Salvadori,* [1949] Ch. 556.

141 *Cf. Compagnia Financiera "Soleada" v. Hamoor Tanker Corpn, The Borag,* [1981] 1 W.L.R. 274 C.A.

Indeed the corollary goes further, and allows recovery for losses and expenses reasonably incurred in mitigation even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. This principle, which at one time boasted no clear illustration, was applied in *Lloyds and Scottish Finance v. Modern Cars and Caravans (Kingston)*.[142] The defendants there had sold to plaintiffs a caravan which was not their property and which was subsequently seized by the sheriff who, upon the defendants protesting, instituted interpleader proceedings against them. At the defendants' suggestion the plaintiffs claimed the caravan, but this claim was withdrawn after legal advice that it was not maintainable, and the plaintiffs paid the costs of the interpleader proceedings. It was held that these costs could be included within the damages for breach of warranty. Edmund Davies J. considered that where steps intended to be by way of mitigation were "taken at the instigation of the defendants, I do not think it is open to them to assert that such steps were not reasonable". Somewhat similar is *Esso Petroleum Co. v. Mardon*.[143] There the defendant had taken a three-year tenancy agreement of a filling station of the strength of the plaintiff oil company's estimate of the station's potential throughput of petrol, an estimate that proved disastrously optimistic. When the truth came out the defendant gave the plaintiffs notice, but the plaintiffs, eager to keep the station open and controlled by a good tenant, offered to the defendant, who accepted, a new tenancy agreement on more favourable terms. The losses in the business however continued, and accordingly the overall loss to the defendant

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142 *Lloyds and Scottish Finance v. Modern Cars and Caravans (Kingston),* [1966] 1 Q.B. 764.

143 *Esso Petroleum Co. v. Mardon,* [1976] Q.B. 801, C.A.

was exacerbated rather than reduced. In the defendant's successful counterclaim for breach of warranty and negligent misrepresentation when sued by the plaintiffs for, *inter alia*, possession of the premises, the Court of Appeal refused to accept that the effect of the statement constituting both the warranty and the misrepresentation was spent by the date on which the defendant entered into the new tenancy agreement, reversing on this the judge below who had taken such date as the cut-off point for the damages. In entering into the second tenancy agreement the defendant was acting reasonably in an effort to mitigate the loss to himself and the plaintiffs so that the loss sustained after that date was attributable to the original statement and was recoverable as damages from the plaintiffs.

Clear illustrations in English law of unsuccessful mitigating action which was not instigated by the defendant are, however, hard to find. The general principle, as stated, may be said to be akin to, and even a part of, the rule, met with the remoteness of damages, that a plaintiff's intervening act reasonably taken to safeguard his interests, whether taken in the "agony of the moment"[144] or not,[145] does not relieve the defendant of liability for the resulting loss. The principle was recognized by Lord Atkinson in *Wilson v. United Counties Bank*[146] where he said:

"If one man inflicts an injury another the resort by the sufferer to reasonable expendients for the bona fide purpose of counteracting, curing or lessening the evil

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144 *Jones v. Boyce,* (1816) 1 Stark. 493.

145 *Canadian Pacific Co. v. Kelvin Shipping Co., (*1927) 138 L.T. 369, H.L.

146 *Wilson v. United Counties Bank,* [1920] A.C. 102 at 125.

effects of the injury done him, does not necessarily absolve the wrongdoer, even though the sufferer's efforts should in the result, undersigngedly aggravate the result of the injury."

On a more general place is the comment of Winn L.J. in *The World Beauty*[147] where he said that he was not aware of any express statement in the cases:

"but it is implicit in the principle, that if mitigating steps are reasonably taken and additional loss or damage results notwithstanding the reasonable decision to take those steps, then that will be in addition to the recoverable damage and not a set-off against the amount of it."

The case that first got near to being an example of this situation if *Jones v. Watney, Combe, Reid & Co.,*[148] and action for personal injury in which the defendant contended that he was not liable in damages for the aggravation to the injury to the plaintiff's foot by reason of her walking on the foot too soon after the accident. Lush J. directed the jury to:

"look at all the circumstances of the case, the medical advice received, the need for action, the usual or extraordinary character of what is actually done, and the precautions taken during the doing of it. The injured person need not act with perfect knowledge and ideal wisdom, but upon the other hand cannot claim damages for such injuries as are really due to wanton, needless, or caress conduct on his own part. If what is done reasonably and carefully

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147 *The World Beauty,* [1970] P. 144, C.A. at 156.

148 *Jones v. Watney, Combe, Reid & Co.,* (1912) 28 T.L.R. 399.

augments the injuries, that may be regarded as natural consequence of the accident."

The jury held the defendant liable for the total injury. More recently, *Metelmann & Co. v. N.B.R. (London)*[149] has provided an illustration, but it is in the peculiar context of anticipatory breach of contract, which has its own special rules as to mitigation. Thus, where in a sale of goods there is a repudiation by the buyer before the time fixed for his acceptance, the damages are still prima facie calculated at that time but become subject to a duty to mitigate on the part of the seller once he has accepted the repudiation, In Metelmann the seller, immediately upon acceptance of the buyer's repudiation, made a sale in a reasonable attempt at mitigation but, as events turned out, on the date fixed for acceptance the market price was higher. The seller was nevertheless held entitled to have the damages based upon the lower price at which the sale had been made. As Browne-Wilkinson L.J. put it: "In addition to the basic damages ... Metelmann is entitled to be compensated for the additional damage flowing from the attempt to mitigate."

11.9 THE RULE AS TO AVOIDED LOSS: NO RECOVERY FOR LOSS WHICH THE PLAINTIFF HAS AVOIDED, UNLESS THE MATTER IS COLLATERAL:

Frequently a plaintiff will have taken the required reasonable steps of mitigation and thereby have avoided such part of the loss as was avoidable. No difficulty arises in such circumstances. But the plaintiff may have gone further and by sound action have avoided more consequences than the dictates of the law required of him.

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149 *Metelmann & Co. v. N.B.R. (London),* [1984] 1 Lloyd's Rep. 614, C.A.

In such circumstances the position has been definitively stated by Viscount Haldane L.C. in the leading case of *British Westinghouse Co. v. Underground Ry*.[150] He put the rule thus:

"When in the course of his business he [the plaintiff] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty of him to act."

Later in his speech he said similarly:

"Provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage."

He emphasized, however, that "the subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business", and the important practical question if therefore what steps taken by the plaintiff satisfy this definition.

Viscount Haldane's formulation of this rule, with its reference to steps taken in the ordinary course of business, is general to contract: this is understandable since *British*

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150 *British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.

Westinghouse Co. v. Underground Ry[151] was a case of breach of contract A wider formulation is that matter completely collateral and merely *res inter alios acta* cannot be used in mitigation of damage.[152] This has the great merit of stating the rule of once concisely and completely: but it gives no indication of how the rule operates and of what solutions would be reached when applying it to particular circumstances. Indeed the line between those avoided consequences, which are collateral and those, which are not is an exceedingly difficult one to draw. It is thought that, in considering the relevant decided cases which are widely dispersed over many fields, Viscount Haldane's formulation is of value, and that assistance is also derived from a division into actions taken before breach and actions taken after breach, and from a subdivision of the latter group into action taken by third parties and actions taken by the plaintiff.

Where it appears that steps have been taken by the plaintiff to avoid loss, being steps, which are not completely collateral, and which are therefore, to be taken into account in assessing the damages, the onus is on the defendant to prove that, and also how far, loss has thereby been avoided.

Thus, in *The World Beauty,*[153] where the plaintiffs' ship had been damaged in a collision while engaged on a charter and the plaintiffs had attempted to mitigate their loss by advancing the commencement of a later charter, it was held

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151 *British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.

152 *British Transport Commission v. Gourley,* [1956] A.C. 185; *Salih v. Enfield Health Authority,* [1991] 3 All ER 400.

153 *The World Beauty,* [1970] P. 144, C.A. at 156.

in their claim for loss of profits that it was for the defendant to prove the value of the advancement.

(1) Actions taken after breach by third parties:

Similarly, actions taken after breach by third parties cannot be within the principles laid down in *British Westinghouse Co. v. Underground Ry*[154] as what is envisaged are steps taken by the plaintiff himself.

This is well illustrated by cases in which the plaintiff has suffered personal injuries and a third party has gratuitously come to his financial rescue by payment of medical or living expenses, or continued payment of wages, or by way of a general sum not in relation to a particular head of loss. In *Liffen v. Watson*[155] the plaintiff's father provided her with free board and lodging during the period when she was unable to continue in her employment as a domestic servant, her employer having remunerated her not only by wages but by board and lodging; in *Dennis v. L.P.T.B.*[156] the plaintiff's employer and the Ministry of Pensions paid the plaintiff, in sick pay and in pension, amounts which together equaled his wages in *Cunningham v. Harrison*[157] *ex gratia* payments had again been made by a sympathetic employer; in *Redpath v. Belfast and County Down Ry*[158] a charitable fund, voluntarily subscribed to by the public, was set up to aid a sum from this fund. No deduction was made in any of these cases from the damages on account of such payment. The benefit this, accruing to the plaintiff may not remain

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154 *British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.
155 *Liffen v. Watson,* [1940] 1 K.B. 556, C.A.
156 *Dennis v. L.P.T.B.,* [1948] 1 All ER 779.
157 *Cunningham v. Harrison,* [1973] Q.B. 942, C.A.
158 *Redpath v. Belfast and County Down Ry,* [1947] N.I. 167.

with him, as he may be under an obligation to pay back to the third party if he should recover damages from the defendant; indeed the court in *Dennis v. L.P.T.B.*[159] directed that the relevant amount of the damages, when received by the plaintiff, should be held by him under an obligation to pay it over to the third party, and the House of Lords has now in *Hunt v. Severs*[160] imposed a trust where the damages are in respect of the plaintiff's care needs. It may be said however that today this situation is not likely to arise with the deduction of more and more collateral benefits in personal injury cases.

Nor are all the illustrations confined to cases involving personal injuries. Thus, in *Gardner v. Marsh and Parsons,*[161] where the plaintiffs purchased a leasehold maisonette with a serious structural defect which their defendant surveyor had failed to detect, they were held to be entitled to the normal measure of damages based on the vale of the property in its defective state at the time of purchase[162] although the defects had been rectified at the plaintiffs' landlord's expense two years after the discovery of the defect and some vile years after the purchase. The landlord's action in repairing the property was said, in familiar terminology, to be collateral and *res inter alios acts*, and also was in no sense part of a continuous transaction of which the purchase was the inception.

In one situation, which must be regarded as exceptional, action taken by a third party after breach will reduce the damages. This is where the defendant has converted the

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159 *Dennis v. L.P.T.B.,* [1948] 1 All ER 779.
160 *Hunt v. Severs,* [1994] 2 A.C. 350.
161 *Gardner v. Marsh and Parsons,* [1997] 1 W.L.R. 489, C.A.
162 *Philips v. Ward,* [1956] 1 W.L.R. 471, C.A.; *Perry v. Sidney Phillips & Son,* [1982] 1 W.L.R. 1297, C.A.

plaintiff's goods and the goods are then applied to paying off a debt owed by the plaintiff to a third party. If this application is one that is authorized by law and which the defendant is powerless to prevent, as where the plaintiff's landlord distrains the goods for the plaintiff's arrears of rent, then the amount of the debt thus satisfied will to in reduction of the normal measure of damages in conversion, i.e. the market value of the goods. In *Plevin v. Henshall*[163] such a reduction was allowed even after judgment, the distress itself taking place after judgment. And even where the application of the goods or their proceeds to the payment of the plaintiff's debts is not one which the defendant was powerless to prevent, and indeed is an application which the defendant himself may have effected, this factor may go in reduction of the damages. The authority for this proposition lies in the Court of Appeal judgments in *Underwood v. Bank of Liverpool,*[164] where the defendant bank had converted cheques of the plaintiff company by crediting them to the company's sole director. Although the question of damages was not up for decision, Scrutton L.J. took the view, with which Atkin L.J. agreed, that the fact that the sole director had used some of the proceeds of the cheques in discharging the plaintiff company's liabilities might to in mitigation of damages, and an inquiry as to the exact facts in this regard was directed. He referred to the dictum of Byles J. In *Edmondson v. Nuttall*[165] that "you could not mitigate damages for conversion of a bag of money converted paid the debt of the plaintiff", and added that he was:

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163 *Plevin v. Henshall,* (1833) 10 Bing. 24.
164 *Underwood v. Bank of Liverpool,* [1924] 1 K.B. 775, C.A.
165 *Edmondson v. Nuttall,* (1864) 17 C.B. (N.S.) 280.

"not sure that the learned judge had in his mind the equitable doctrines under which a person who had in fact paid the debts of another without authority was allowed the advantage of his payments."

This reference to equity and to equitable doctrines[166] suggests that the court is moving away from strict common law conceptions of damages altogether, and tends to highlight the exceptional nature of the type of case under consideration. This exceptional quality is also emphasized both the strict limits placed upon allowing the amount of a plaintiff's paid debts to go in reduction of the damages awarded him and by the fact that the rationale of these limits is not very clearly defined. This it was held in *Edmondson v. Nuttall*[167] that, where the application of the goods to the payment of the debt was authorized by law but the legal process was in favour of the defendant himself as the plaintiff's creditor, no reduction of the normal measure of damages fell to be made. And in *Lloyds Bank v. Chartered Bank,*[168] where the plaintiff was suing for conversion of cheques by the defendant bank in paying them to the plaintiff's accountant, the Court of Appeal held that the damages were not to be reduced by reason of the fact that the accountant had used some of the cheques to pay not the plaintiff's debts but his own debts to the plaintiff. Finally, it should be noted that in certain cases, notably in actions for wrongful distress for rent, deduction of the amount of the debt paid from the value of the goods is made in order to arrive at the normal measure of damages without the necessity of any resort to doctrines of

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166 *Reid v. Rigby,* [1894] 2 Q.B. 40*; Bannatyne v. MacIver,* [1906] 1 K.B. 103, C.A.; *Reversion Fund and Insurance Co. v. Maison Cosway,* [1913] 1 K.B. 364, C.A.

167 *Edmondson v. Nuttall,* (1864) 17 C.B. (N.S.) 280.

168 *Lloyds Bank v. Chartered Bank,*[1929] 1 K.B. 40, C.A.

mitigation. Thus, the normal measure of damages is the value of the goods wrongfully distrained less the rent due in actions both for irregular[169] and for excessive[170] distress.[171]

(2) Actions taken after breach by the plaintiff:

Actions taken after breach by the plaintiff himself are directly within the principles laid down in *British Westinghouse Co. v. Underground Ry*[172]: it is here that is found the core of the problem. The matter is not well worked out in the authorities and all that can be done is to sketch what the law probably is. Some applications of the rule are admittedly simple and are so straightforward as generally to be taken for granted. Thus, where the plaintiff has recovered damages from a third party, who is also liable. He cannot recover damages over again from the defendant for the same loss.[173] Again, where a plaintiff has accepted the return of his goods, which the defendant had converted, he cannot sue the defendant for their value.[174]

The difficult cases generally concern contracts of sale of goods, where on the defendant's default the plaintiff taken steps to remedy his situation by acquiring substitutes or by disposing of the goods to a third party. It is suggested that the basic rule is that the benefit to the plaintiff, if it is to be taken into account in mitigation of damage, must arise out of the act of mitigation itself.

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169 *Biggins v. Goode,* (1832) 2 Cr. & J. 364.

170 *Wells v. Mody,* (1835) 7 C.&P. 59.

171 *Keen v. Priest,* (1859) 4 H.& N. 236; *Attack v. Bramwell,* (1863) 3 B & S. 520.

172 *British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.

173 *Burn v. Morris,* (1834) 2 Cr. & M. 579.

174 *Moon v. Raphael,* (1835) 2 Bing.N.C. 310*; Evans Marshall & Co. v. Bertola S.A. and Independent Sherry Importers,* [1976] 2 Lloyd's Rep. 17, H.L.

Thus, where a seller fails to deliver goods, or delivers defective goods, and the buyer wishes to claim damages for the loss of profit he would have made from the goods, he must show that he has taken reasonable steps in mitigation by attempting to acquire a substitute. If then, in acquiring such a substitute the plaintiff gains some benefit, this must be taken into account in assessing the damages. This was the situation in the leading case of *British Westinghouse Co. v. Underground Ry.*[175] Turbines supplied under contract to the plaintiff railway company were deficient in power and in economy of working and not in accordance with the contract. The plaintiff used them for a time, but ultimately replaced them by others of a different make and design which were more powerful and which brought in greater profit than the original machines would have, even had they been up to standard. The plaintiff claimed to recover as damages the cost of the substitute, a consequential loss, but this loss was held not recoverable since the consequential gain in profits and saved expenses was to be taken into account, and on balance no net loss showed on the purchase of the substitute. Somewhat similar is *Erie County Natural Gas Co. v. Carroll*.[176] There the plaintiff had transferred gas leases to the defendant, reserving the use of such gas as would be sufficient to supply certain plant operated by him in his business. When the defendant wrongfully cut off the gas supply due under the reservation clause, the plaintiff procured the gas required for his plant by the acquisition of other gas lease from independent sources and by the construction of works to produce gas.

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175 *British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.

176 *Erie County Natural Gas Co. v. Carroll,* [1911] A.C. 105, P.C.

When subsequently the plaintiff sold his business, he sold for more than they cost him the substituted gas leases and the works constructed by him. The Judicial committee of the Privy Council, reversing the Ontario Court of Appeal, held the plaintiff entitled to only nominal damages in his action against the defendant for breach of contract on the ground that the measure of damages was the cost to the plaintiff of procuring the substitute gas. Lord Atkinson said:

"It would have been competent for the plaintiffs to have abstained from procuring gas in substitution for that which the defendants should have supplied to them, and have sued the defendants for damages for breach of their contract. They did not take that course. They chose to perform on behalf of the defendants, in a reasonable way, that contract for them and to obtain from an independent source a sufficient quantity of gas similar as near as might be in character and quality to that which they were entitled to receive. In such cases it is well established that the measure of damages is the cost of procuring the substituted article, not at all the price at which the substituted article when procured could have been sold by the person who has procure it."

In the converse situation, where the breach of contract was a failure by the defendant to accept goods which the plaintiff had agreed to manufacture and supply, it was held by the House of Lords in *Hill v. Showell*[177] that evidence was admissible t show that the plaintiff was enabled, because of the breach, to execute other profitable orders, since this was relevant in assessing the damages in the plaintiff's claim for loss of profits. Viscount Haldane said:

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[177] *Hill v. Showell,* (1918) 87 L.J.K.B. 1106, H.L.

"If in the course of his business, he [the plaintiff] has taken action which has actually arisen out of the situation in which his machinery was rendered free by reason of the breach, and by taking on new contracts occasioned by this situation has diminished his loss, he must give credit for the diminution, even though he may have gone somewhat out of his way to make fresh efforts because of the position in which he found himself with unemployed machinery."

On the other hand, where a seller fails to deliver goods, delivers them late, or delivers defective goods, and the buyer claims only the normal measure of damages with no claim for lost profits or other consequential losses, there is no necessity for the buyer, in the interests of mitigation, to buy other goods in the market in the case of failure to deliver, or to sell the goods on delivery in the case of delay or defects. It should follow therefore, if the plaintiff in the one case buys later when the market has fallen, or in the other case sells later when the market has risen, that this gain to the plaintiff should redound to his advantage and not be brought in so as to reduce his damages. A clear illustration of this proposition is provided[178] by *Jones v. Just,*[179] where the plaintiff bought first quality hemp and second quality hemp was delivered. The market price of hemp then rose, enabling the plaintiff to resell the delivered hemp at substantially the market price at which the first quality hemp had stood at the time of delivery. Nevertheless the normal measure of damages under section 53 (3) of the

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178 *Werthein v. Chicoutimi Pulp Co.,* [1911] A.C. 301, P.C; *Williams v. Agius,* [1914] A.C. 510; *Slater v. Hoyle & Smith,* [1920] 2 K.B, 11, C.A.*; Bence Graphics International v. Fasson U.K.,* [1997] 1 All ER 979, C.A.

179 *Jones v. Just*,(1868) L.R. 3 Q.B. 197.

Sale of Goods Act, 1893 was held to apply.[180] On the other hand, in the rather special situation which arose in *Pagnan & Fratelli v. Corbisa Industrial Agropacuaria,*[181] where the plaintiffs, after non-delivery, subsequently bought not substitute goods in a fallen market but the self-same goods from their own seller at a renegotiated and substantially reduced price, which purchase was found by the court not to be an independent or disconnected transaction but to be part of a course of continuous dealing between the parties, it was held, applying the principles laid down in *British Westinghouse Co. v. Underground Ry,*[182] that this later purchase must be taken into account so as to oust the normal measure of damages under section 51 (3) of the Sale of Goods Act, 1979 and to debar the plaintiffs from any recovery.[183]

In the converse situation where a buyer of goods fails to accept them and the seller subsequently resells them on a rising market, a corresponding result is reached. The principal case is *Jamal v. Moola Dawood*.[184] A buyer of shares refused to accept them, the market rose and the seller re-sold; this gain to the seller was ignored in assessing the buyer's damages. And in *Campbell Mostyn v. Barnett*[185] this was applied to a sale of goods.[186]

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180 *Jewelowski v. Propp*, [1944] K.B. 510.

181 *Pagnan & Fratelli v. Corbisa Industrial Agropacuaria,* [1970] 1 W.L.R. 1306, C.A.

182 *British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.

183 *Jamal v. Moola Dawood,* [1916] 1 A.C. 175, P.C.; *Campbell Mostyn v. Barnett,* [1954] 1 Lloyd's Rep. 65, C.A.

184 *Jamal v. Moola Dawood,* (1875) L.R. 10 C.P. 300.

185 *Campbell Mostyn v. Barnett,* [1954] 1 Lloyd's Rep. 65, C.A.

186 *Oldershaw v. Holt,* (1840) 12 A. & E. 590; *Hardley v. Baxendale,* (1854) 9 Ex. 341.

Outside the authorities on the sale of goods or shares, two cases involving a temporary deprivation of the use of a ship provide on this issue an interesting contrast. In *Jebsen v. East and West Indian Dock Co.*[187] the defendant, in breach of a contract to discharge the plaintiff's ship, was late in completing her discharge with the result that the plaintiff lost the fares of the passengers who were due to sail on the ship for America. In consequence, another two ships, also owned by the plaintiff, gained these passengers, but it was held that this factor could not be allowed to reduce the plaintiff's damages. Here the benefit which the defendant wished to offset arose from the emergence of the opportunity to put other property of his, which happened to be available, to immediate profitable use in substitution, accordingly did not arise out of any act of mitigation, and therefore, was properly disregarded. On the other had, in *The World Beauty*[188] the benefit did arise out of the act, or in this case acts, of mitigation and had therefore t be brought into account. At a time when freight rates were low the plaintiffs' tanker suffered serious damage in a collision while operating under a charterparty negotiated at a time when, following upon the closure of the Suez Canal towards the end of 1956, freight rates were very high. The plaintiffs chartered another ship at the low rates then prevailing, employing her as a substitute ship to perform the charter, and on completion of the necessary repairs to the damaged ship advanced by some 100 days her employment under a second charter, which had also been negotiated when freight rates had been very high and which was a seven-year time charter. The Court of Appeal held that against the losses due to the collision must be set both the profit made

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187 *Jebsen v. East and West Indian Dock Co.,* (1875) L.R. 10 C.P. 300.

188 *The World Beauty,* [1970] P. 144, C.A.

by the substitute ship under the remainder of the first charter and the gain attributable to the making of the profit on 100 days of the second charter seven years earlier than it would otherwise have accrued. Credit had not to be given, however, for the whole of the high 100-day profit under the second charter because the earning of that profit did not flow from a step taken in consequence f the collision but from the negotiation of the second charter months previously.[189]

Somewhat similar is the decision in *Nadreph v. Willmet & Co.*[190] The plaintiffs, who held the leasehold reversion on certain premises, wished, on the expiry of the tenancy to which their holding was subject, to retain for their own use the part of the premises which their tenants had themselves sub-let while being willing to grant the tenants a new tenancy of the part of which they were in occupation. The defendants, the plaintiffs' solicitors, served notice on the tenants, as instructed, terminating their tenancy but stating, contrary to instructions, that the plaintiffs would oppose a grant of a new tenancy of any part of the premises, with the result that, by virtue of the provisions of the Landlord and Tenant Act, 1954, the tenants became entitled to claim compensation of £133,276 from the plaintiffs. The defendants successfully argued that they were entitled to set off against the damages arising from the liability to pay compensation any greater benefit that the vacation by the tenants of the part of the premises which they occupied would bring to the plaintiffs, by way of securing another tenant or for use for their won business, than would have resulted from the continuance of the tenants' occupation of

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189 *The Timawra,* [1996] 2 Lloyd's Rep. 166; *The Kriti Rex,* [1996] 2 Lloyd's Rep. 171.

190 *Nadreph v. Willmet & Co.,* [1978] 1 W.L.R. 1537.

the premises. This benefit would arise out of the act of mitigation itself, whether the act of occupying and using the premises or the act of letting to another tenant, and it was no answer to rely upon the assertion, as the plaintiffs did, that "there is no authority which establishes that a benefit secured in mitigation of damage of one kind can be set off against damage of a whole different kind".

The World Beauty[191] apart, all the cases so far considered have been of contract. *Bellingham v. Dhillon*[192] neatly illustrates the application here of the basic rule that benefit is taken into account where arising out of the act of mitigation itself. Because of injuries received in a car accident for which the defendant was liable, the plaintiff, who owned and ran a driving school, lost the opportunity of buying on hire purchase an expensive driving simulator, which enabled driving tuition to be given in a lecture room rather in a car on the road. Some three-and-a-half years later, however, he was able to buy the same equipment as liquidated stock for a fraction of the original price. In his claim for the three-and-a-half year loss of profits which he would have made had he had the original simulator, it was held that there must be brought into account the profits in fact earned by the substitute simulator. In the result the plaintiff was unable to show any loss on the simulator venture. *Salih v. Enfield health Authority*[193] is a more unusual illustration. Parents of a child born suffering from congenital rubella syndrome sued the health authority for failure to diagnose and warn of this danger with the result that no steps were taken to terminate the pregnancy. The parents had planned to have further children but decided

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191 *The World Beauty,* [1970] P. 144, C.A.
192 *Bellingham v. Dhillon,* [1973] Q.B. 304.
193 *Salih v. Enfield health Authority,* [1991] 3 All ER 400, C.A.

not to do so because of the difficulty and strain involved in bringing up a handicapped child. In these circumstances, their claim for the cost of maintenance of the handicapped child was held by the Court of Appeal, reversing the judge below, to be limited to the extra cost of caring for the child's special needs and did not include the basic cost of maintenance. Citing Viscount Haldane's formulation of the rule for contract in *British Westinghouse Co. v. Underground Ry,*[194] together with the wider formulation Butler-Sloss L.J. giving the leading judgment went on to say: "The contemplated cost ... would be spent on an identical purpose, in *pari material* with the costs of [the handicapped child] and cannot be said to be merely collateral. The decision of the parents not to have another child and the consequential saving of likely future expenditure is, in my judgment, a relevant consideration upon which the defendants were entitled to rely." In contrast to these two cases the action taken by the plaintiffs in *Hussey v. Eels*[195] was held not to cut down their loss. A negligent misrepresentation was made by the defendants that the bungalow that they were selling to the plaintiffs for £53,250 had not been subject to subsidence. Because repairs would be very costly the plaintiffs decided that the best course was to demolish the bungalow and to apply for planning permission to erect two others in its place. They then sold the property with the benefit of the planning permission, which they had obtained, to developer for £78,500. In their claim for damages they were held entitled to the normal measure represented by the contract price less the value of the bungalow in its unsound condition at the date of the sale; the defendants' argument that the

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194 *British Westinghouse Co. v. Underground Ry,* [1912] A.C. 673.

195 *Hussey v. Eels,* [1990] 2 Q.B. 227, C.A.

plaintiffs' loss had been eliminated by their sale to the developer was rejected.

A profit on the resale of defective property, the purchase of which has been induced by a negligent misrepresentation, was not to be taken into account in the assessment of damages for the misrepresentation if the resale was not part of a continuous transaction commencing with the original purchase of the property. Since the plaintiffs had purchased the house to live in and had indeed lived in it for a considerable period, it followed that when they unlocked the property's development potential they did so for their own benefit and were not required to bring it into account in mitigation of damages.

Similar to this is *Dominion Mosaics and Tile Co. v. Trafalgar Trucking Co.*[196] The buildings in which the plaintiffs carried on their business were so damaged by a fire negligently caused that they acquired new premises in which to continue. Subsequently, having taken a lease of still further premises, they sold the new ones at a profit. In their successful claim for the cost of acquiring the new premises the plaintiffs were held not accountable for this profit; the negligent defendants, it was said, were not entitled to the benefit of any successful property dealings carried out by the plaintiffs.

11.10 CONCLUSION:

It is indeed true that the legislature cannot visualize all the situations, which would arise in future. But the framers of the Indian Contract Act, 1872, while drafting the provision

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196 *Dominion Mosaics and Tile Co. v. Trafalgar Trucking Co.,* [1990] 2 All ER 246, C.A.

of breach of contract were careful, cautious and vigilant enough for the wordings used in Section 73. In India, the duty to mitigate the damages is in case of breach of contract has been thoroughly recognized and laid down in the explanation attached to Section 73 of the Indian Contract Act and illustration (b) attached with it. It was enacted therein that "in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account." The language of the explanation is not to be found in any of the English in practical application. Though, the expression "means which existed of remedying the inconvenience" is not happily worded, various High Courts in the country have interpreted it to mean that it lays a duty upon a person complaining of breach of contract, to use common intelligence and prudence, and take all natural and obvious steps available to diminish the loss arising from the breach.

In *Thawardas Pherumal v. Dominion of India*,[197] decided by the Supreme Court the appellant who was a contract entered into a contract with the Dominion of India for the supply of 21/2 crores of *pucca* bricks to the C.P.W.D., a department of the Dominion government. Delivery was to be at the kiln site but owning to the default of the C.P.W.D. in not removing the burnt bricks, which were ready for removal, delay occurred in the timetable and the rains set in with the result that the rains destroyed 88 lcas of katcha bricks. As this loss was occasioned by the default of the C.P.W.D. the contractor claimed that he should be paid

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197 *Thawardas Pherumal v. Dominion of India*, AIR 1955 S.C. 468 at pp. 471, 472 : (1955) 2 M.L.J. (S.C.) 23; 1955 S.C.J. 445 : 1955 S.C.A. 862 : (1955) 2 S.C.R. 48 : 1955 M.W.N. 782 : I.L.R. 34 Pat. 359 : 57 Punj. L.R. 369.

their prices. The Union government relied on clauses of the agreement which is in these terms: “The department will not entertain any claim for idle labour or for damage to unburnt bricks `due to any cause whatsoever’.” If, with that in view, Government expressly stipulated, and the contractor expressly agreed, that Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. The contractor had a duty under Sec. 73 of the Indian Contract Act to minimize the loss, accordingly he would have had the right to remove the bricks himself and stack them elsewhere and claim compensation for the loss so occasioned. Alternatively, he could have sold the bricks in the market and claimed the difference in price, but ordinarily he could not have claimed compensation for damage done to the *kaccha* bricks unless he could have shown that kind of damage, ordinarily too remote, was expressly contemplated by the parties when the contract was made; Sec. 73 of the Indian Contract Act.

Section 73 of the Indian Contract Act speaks of compensation for breach of contract. Under explanation to Sec. 73, the burden is on the plaintiff, who has proved the breach of the contract, of further establishing that he has taken all reasonable steps to mitigate the loss, consequent on the breach of the contract. In the instant case, it is the case of the plaintiff that the sugar company did not receive as per the agreement 47 and odd tones of sugarcane at the agreed rates. The Courts below have concurrently held that the defendant company committed breach of contract. That being so it is obvious that the plaintiff is entitled to damages. To that extent there is no dispute whatsoever. The point of difference starts after that stage. It is submitted that the plaintiff did not place any material as required under Sec. 73 of the Indian Contract Act as

contained in the explanation thereto, that he made any honest attempts to mitigate the damages by trying to sell the sugarcane in the open market and that he thereby incurred any loss. It is no doubt true that in view of the explanation to Sec. 73, a duty is cast on the plaintiff who goes to Court for damages to plead and prove that he took all reasonable steps to mitigate the damages. In the instant case, according to the plaintiff, the defendant company refused to take 47 and odd tones of sugarcane. If that is so, it was his duty to plead how he tried to mitigate the damages by selling the sugarcane in the open market. He has not done so. He has neither pleaded nor proved that he made any such attempt. In the circumstances, therefore, there is no basis to award any damage to the plaintiff. However, taking a broad and commonsense view, the plaintiff should be compensated at Rs. 5 per tonne.[198]

Under the Contract Act there is a duty on a person claiming damages on account of breach of contract to mitigate the damages.[199]

In the case of contracts for sale or purchase of goods, the defendant may show that the plaintiffs could have gone into the market and obtained a new contract on better terms.[200] If the plaintiff is the purchaser, the defendant will get the benefit of a falling market, while, if the seller is the plaintiff, the purchaser will get the benefit of the rising market. In each case, if he goes to the market, the loss, which would otherwise have resulted to him from the defendant's breach of contract, would be avoided. If he could so prevent the

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198 *Mysore Sugar Co. v. Y.B. Boraiah,* (1981) 1 Kant. L.J. 263 at pp. 265, 266, 267.

199 *Bengal Coal Supplying v. Union of India,* (1968) 70 Bom. L.R. 254 at p. 257.

200 *Bilas Ram v. Ezekial,* 33 I.C. 1 at p. 9.

loss at a trifling expense, or with reasonable exertions, he will be fulfilling his duty to mitigate the damages.[201]

Thus, from the aforesaid comparative study on the topic of quantum and mitigation of damages, it is clear that a plaintiff cannot claim as damages any sum, which is due to his own negligent act. In other words, one can say that a party is not entitled to damages if, by the use of reasonable precautions, he might have avoided the loss. So, where the plaintiffs sued in respect of damage caused by rain water to bags of dried prawns stored in the defendant's godowns, and where it appeared that there was quite sufficient time for the plaintiff to have taken delivery and that he allowed the goods to deteriorate, and become unsaleable, it was held that the plaintiffs had failed to do what they might have done to remedy the inconvenience.[202] So also, where a lessee vacated the premises before the expiry of the term, the lessor was held bound to mitigate the damages by letting out the premises on such rent as he could get and claim the difference alone from the lessee.[203] Again where the lessee unreasonably refuses to take possession of the leasehold premises, the lessor though entitled to damages is under a duty to make reasonable efforts to secure another tenant and otherwise cover the loss.[204] In the converse case, where the lessor fails to put the lessee in possession, the latter is bound to mitigate the loss arising from such failure, by making reasonable efforts to secure

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201 *Rangaswami Iyer v. Venkatarama Iyer,* 28 I.C. 635 at p. 637.

202 *Commissioners for the Port of Rangoon v. Moola Dawood,* 9 I.C. 470.

203 *Govindaswami Chettiar v. palaniappa Chettiar,* 48 M.L.J. 397.

204 *Lakshmi Narain v. Verno,* 5 P.I.R. 1907 : 137 P.R. 1906.

other land upon lease.[205] Where a lessee fails to take possession of the land, which was the subject matter of the lease, even though it was available for him to do so, he cannot claim damages from the lessor for non-delivery.[206] Again, where the defendant failed to build a wall according to agreement and such failure was likely to produce damage to the plaintiff's house, it was held that the plaintiff was under a duty to take reasonable steps to prevent damage and that it was not open to him to stand by and recover any loss which might have been so prevented.[207]

As the researcher is making a comparative study of English Law and Indian Law on the subject of damages for breach of contract, necessary comparison has been made on the topic of mitigation of damages also. While comparing the legal position of both these countries it is found that no remarkable difference is there between English Law and Indian Law so far as rule relating to mitigation of damages is concerned. The only thin line difference, which was noticed during this comparative study, is that, the rule in the explanation to Section 73 of the Indian Contract Act is applied with great care and caution. One can say in more strict and rigid manner than that is in England.

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205 *Amanchi Venkata Ramastrulu v. Nama Venkana,* 37 M.L.J. 355; *Ma Hnin Yi v. Chew Whee Shein,* AIR 1925 Rang. 261 at p. 262.

206 *Ghulam Haidar v. Iqbal Nath,* AIR 1939 Lah. 118 at p. 122.

207 *Ramkaur v. Shankar Dutt,* 108 I.C. 433.

CHAPTER - XII

CONCLUSION

12.1 GENERAL CONCLUSION – SOME SUGGESTIONS:

The law regarding damages for breach of contract has began its journey few centuries ago and after passing through tough time and confusions it has reached to the level where it stands today with reasonable good clarity but even these days the law of damages seems to be changing, and the whole developing for the better, all the time, every day, with each new challenge. Certainly, much more change has appeared between the positions which was prevailing few centuries ago and today and much more change, we can still apprehend which is prevailing today and in each and every tomorrow. A pointer to the shifts of emphasis and changes of significance in the subject over the period of time is all that is required for the development of the law of breach of contract.

Recovery for non-pecuniary loss in contract, which was marching ahead at the time few decades ago, has taken down turn and new landmark has been achieved in the said subject through *Watt v. Morrow* [1]and other cases. The impact of contributory negligence for breach of contract has now been well defined and well settled in *Forsikringsaktieselskapet Vesta v. Butcher (No. 1).*[2]

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1 *Watt v. Morrow,* [1991] 1 W.L.R. 1421; [1991] 4 All ER 937; (1991) 23 H.L.R. 608; 54 B.L.R. 86; [1991] 2 E.G.L.R. 152; [1991] 43 E.G. 121.

2 *Forsikringsaktieselskapet Vesta v. Butcher (No. 1),* [1989] A.C. 852; [1989] 2 W.L.R. 290; (1989) 133 S.J. 184;

Decisions on causation continue to trouble the law; the issue has been said to be one of common sense in *Galoo v. Bright Grahame Murray,*[3] but it is difficult to see how far an appeal to common sense, itself elusive, takes us. The attenuation of *The Liesbosch*, with its concern over impecuniosity, has continued in *Mattocks v. Mann*.[4] The difficult border line between the need for proof on the balance of probabilities and the need to show only loss of chance has been usefully elucidated in *Allied Maples v. Simmons & Simmons*[5] and other cases. The correctness of *Brunsden v. Humphrey*[6], allowing two actions for damages, has been seriously doubted in *Talbot v. Berkshire County Council*.[7] The availability of exemplary damages, severely restricted since *Rookes v. Barnard*,[8] is now further confined to causes of action in which they had been awarded before that restriction was introduced in *A.B. v. south West Water Services*.[9] A realistic approach towards holding for liquidated damages as against penalty has manifested itself in *Philips Hong Kong v. Att.-Gen. of Hong Kong*[10] as has also a liberal attitude to the recovery of deposits where they smack of penalty in *Workers Trust and Merchant Bank v.*

[1989] 1 All ER 402; 1989 Fin.L.R. 223; [1989] 1 Lloyd's Rep. 331; (1988) 4 Const. L.J. 75, H.L.

3 *Galoo v. Bright Grahame Murray,* [1994] 1 W.L.R. 1360; [1994] 1 All ER 16; [1994] B.C.C. 319

4 *Mattocks v. Mann,* [1993] R.T.R. 13; The Time, June 19, 1992, C.A.

5 *Allied Maples v. Simmons & Simmons,* [1995] 1 W.L.R. 1602; [1995] 4 All ER 907; [1995] N.P.C. 83; (1995) 145 N.L.J. Rep. 1646, C.A.

6 *Brunsden v. Humphrey,* 91884) 14 Q.B.D. 141, C.A.

7 *Talbot v. Berkshire County Council,* [1994]Q.B. 290; [1993] 3 W.L.R. 708; [1993] 4 All ER 9;

8 *Rookes v. Barnard,* [1964] A.C. 1129; [1964] 2 W.L.R. 269; 108 S.J. 93; [1964] All ER 367; [1964] Lloyd's Rep. 28, H.L.

9 *A.B. v. South West Water Services, sub nom. Gobbons v. South West Water Services* [1993] Q.B. 507 [1993] 2 W.L.R. 507; [1993] 1 All ER 609.

10 *Philips Hong Kong v. Att.-Gen. of Hong Kong,* 91993) 61 B.L.R. 41.

Dojap Investments.[11] The courts have at last become prepared to reduce the number of years for which interest is awarded where there has been excessive delay in bringing a case to trial in *Metal Box v. Currys*[12] and the reduction of awards of interest on account of tax has fortunately continued in *Deeny v. Goods Walker (No. 3)*[13]. In a misguided development, departing from over a century of authority, decisions are appearing refusing the recovery of costs incurred in other proceedings in *British Racing Drivers Club v. Hextall Erskine & Co.*[14] With a buyer of goods claiming for breach of warranty, there has been an important change of heart on the relevance of his successfully selling on to his sub-buyer in *Bence Graphics International v. Fasson UK*.[15] The restrictive rule in *Bain v. Fothergill*,[16] applying in contracts for the sale and lease of land, has at last gone, succinctly abolished by statute (Law Reform (Miscellaneous Provisions) Act, 1989, s. 3); this finally establishes the universality of the rule that the contracting party is entitled to the benefit of his bargain. The owner of a building defectively constructed by the contractor has been held entitled to no damages for pecuniary loss, yet to a modest amount for non-pecuniary loss, where the defects have resulted in no diminution in value and reinstatement would have been unreasonable in

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11 *Workers Trust and Merchant Bank v. Dojap Investments,* [1993] A.C. 573; [1993] 2 W.L.R. 702; [1993] 2 All ER 370.

12 *Metal Box v. Currys,* [1998] 1 W.L.R. 175; (1988) 132 S.J. 52; [1988] 1 All ER 341.

13 *Deeny v. Goods Walker (No. 3),* [1995] 1 W.L.R. 1206; [1995] 4 All ER 289; [1996] L.R.L.R. 168.

14 *British Racing Drivers Club v. Hextall Erskine & Co.,* [1996] P.N.L.R. 523.

15 *Bence Graphics International v. Fasson UK,* [1997] 1 All ER 979, C.A.

16 *Bain v. Fothergill,* 91874) L.R. 7 H.L. 158.

Ruxley Electronics v. Forsyth.[17] In employment contracts the refusal of damages for injury to reputation causing pecuniary loss has sensibly been departed from *Malik v. BCCI*,[18] a reversal by the House of Lords.

Nearly three-quarters of century ago Baron Wilde has said in *Gee and others v. Lancashire and Yorkshire Rly. Co.,*[19] that "the question of the measure of damages is one that has produced more difficulty than perhaps any branch of the law" and forty years later Lord Halsbury, L.C., in his celebrated judgment in *The Mediana,*[20] has struck the same note when he said that "the whole region of inquiry into damages is one of extreme difficulty". And yet the subject of Damages is the least studied and hence the least understood in India. This is mainly due, not to the infrequency of Actions for Damages in our Courts but ot an unfortunate misconception of the real scope and importance of the subject. In India, the litigants, the lawyers, and the system also, specially in mofussil, generally understands that any sort of litigation brought before the Court of law under the heading "damages for breach of contract" is usually a lavish litigation and not a litigation arising out of necessity. The general impression is that the litigation instituted for claiming damages for breach of contract is still considered as a litigation of a choice. But the time has already come when the Indian legal system can no longer afford to neglect the litigation filed under this branch of law, which from a practical point of view really open a new and

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17 *Ruxley Electronics v. Forsyth,* [1996] A.C. 344; [1995] 3 W.L.R. 118; [1995] 3 All ER 268; 73 B.L.R. 1.

18 *Malik v. BCCI,* [1997] 3 All ER 1, H.L.; [1995] 3 All ER 545, C.A.

19 *Gee and others v. Lancashire and Yorkshire Rly. Co.,* (1860) 6 H.&N. 211; 30 L.J.Ex. 11; 3 L.T. 328; 9 W.R. 103; 6 Jur. (n.s.) 1119; 158 E.R. 87.

20 *"The Mediana",* (1900) A.C. 113

extensive field for exploration. Modern commercial life and widening self-consciousness of our civil rights greatly require thorough and detail knowledge and involvement in the said subject. It requires mastery not only of the principles of liability, but also of the principles upon which damages have to be measured. However, it is regrettable that our legal literature which of late years is growing in enormous propositions, has not up to now furnished us with a comprehensive work on the subject of damages for breach of contract.

While making research on the subject of damages for breach of contract, the topic of frustration of contract was also considered. The study of frustration of contract also proved to be an interesting and fascinating study. There was a time when contract was considered as a piece of private legislation, sacred, sacrosanct, to which man was required to do obeisance from afar but not to go near the *sanctum sanctorum*. Parties stood in awe of the sacred pact as it were placed on par with Holy Scripture so sanctified as no to be defiled by human touch. Even the judges shied from touching the contract by supplying an obvious gap or implying a term, by pleading helplessness in the matter. It was repeatedly averred by the courts that it was for the parties to make the contract and for the courts to enforce it. Like all human institutions, nothing is static but the change is so imperceptible that it is difficult to pinpoint any point of time when the old doctrine was discarded and the new doctrine evolved. When the courts pleaded impotence and proceeded to enforce the contract as worded, despite the fact that the enforcement perpetrated injustice, there was certain amount of resentment in the minds not only of the lawyers but the judges themselves apart from the litigating public and a search was made for a solution. It was

unthinkable to take it lying down that the courts were instruments of doing injustice by enforcing such an atrocious covenant. It was very strongly felt that the court should do its duty as an instrument of doing justice and find a way out how to go about it. English ingenuity did not fail to meet the situation and a doctrine of implied term was resorted to by courts. Once the courts assumed the role of interfering with the contract in order to do justice between the parties by introducing implied terms as fair and reasonable, the old and impregnable fortification of absolute liability crumbled.

But the difficulty with the Indian legal system was that the law of damages was in an extremely uncertain, ambiguous and confused state for number of decades. It was a mixed bag. It was consisting partly Hindu Law, partly Mohammedan and partly English Law. Which principle of which law would be applied by the Court to decide a dispute was most difficult to predict beforehand till the judicial pronouncement was made. In the *Mofussil*, under the maxim of justice, equity and good conscience, some principles of English law were being imported. In the presidency towns, the Supreme Courts were required to administer Hindu Law, Mohammedan Law and English Laws of damages. In actual practice, the Hindu and Mohammedan laws were not very much applied end, by and large the English Law was in vogue in the presidency towns.

So when the Britishers came to India for trading and in the process of trading became the rulers of India till that day the Indian legal system was not equipped with codified law as far as law regarding breach and damages arising out of such breach are concerned. Being rulers of India, Britishers gave legislations, precedent and authority of the crown. Law

of damages was completely developed under the shadow of the British regime. However, the word “Damage” has nowhere been defined in either English Law or in the Indian Contract Act, 1872. But with the gradual development of stable and systematic legal system we are now able to arrive at clear meaning of damages and various heads in which it can be claimed.

It is clear that any aggrieved or injured party can claim damages under any of the above-mentioned heads of damages for breach of contract, and get compensation only if he proves to suffer injury because of the breach committed by the defendant. To put it in simple words, one may say that before a person can get any damages, he must prove that he had suffered an injury. Law does not taken into account all harms suffered by a person, which caused no legal injury. The damage so caused is called *damnum sine injuria.* The term ‘*injuria’* is to be understood in its rightful and proper sense. If such legal injury is proved, it becomes the duty of the Court to do justice to the sufferer but while doing so the Judges have to itemize the damages in order to calculate the interest. This does not mean that the total award is necessarily to go up higher on that count. The total award is still to be one, which gives him fair compensation in money for his injury. Care must be taken to avoid the risk of overlapping.

The best example of it is the landmark decision of *Hadley v. Baxendale*,[21] which defines the kind of damage i.e. appropriate subject of damages and excluded all other kinds as being too remote. The decision was concerned solely with what is correctly called remoteness of damage,

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[21] *Hadley v. Baxendale,* (1854) 9 Exc. 341.

and it will conduce to clarity if this expression is reserved for cases wherein the defendant denies liability for certain consequences that have followed from his breach. The other question is which must be kept quite distinct from the aforesaid, concerns the principle upon which damage could be evaluated or quantified in terms of money. This may appropriately be called the question of measurement of damages. The principle adopted by the Courts in many cases dating back to at least 1848 is that of *restitutio in integrum*. If the plaintiff has suffered damage that is not too remote, he must, so far as money can do it, be restored the position he would have been in had that particular damage not occurred. From the aforesaid discussion, it is now crystal clear that what is awarded under heading of damages for breach of contract is, what is to be the loss which the plaintiff has suffered and not the profit which the defendant has made.

It is pertinent to note that, except in few cases of contract where specific performance may be granted, damages constitute the main, if not the only form of, relief, which a person complaining of an injury of any kind is entitled to derive. In nearly 8% of the cases decided in our Courts the Common law relief by way of damages is being claimed by the injured party, either in the shape of profits, interest, costs and expenses or other money compensation such endless forms of losses, which flow from a given injury. It is thus of immense importance that the practitioner should have a clear grasp of the principles which regulate the award of Damages. Knowledge of what damages direct, and what damage is indirect and remote, and knowledge as to when, how and in what manner the injured party should perform the duty of mitigating the damages, is so essential that for want of proper appreciation a good cause is often

lost. In some cases the liability to compensate is itself so mixed-up with different questions.

The purpose to undergo the entire research exercise lies in a question that what can be the reasonable amount of damages, which can be awarded in the circumstances when the breach of contract is proved. For instance, there is a case which famously known as Dr. Fishel's case.[22] In which there is no doubt that Dr. Fishel was in breach of contract in failing to obtain the requisite consent for his paid outside work. The University can seek to recover damages arising out of breach. On the traditional view this means the University can recover such loss as has resulted from the breach. But the core question arise here is what that loss is in the present situation and peculiar circumstances of this fact?

In order to answer this question it is necessary to identify exactly wherein the breach lies. It is not, as the claimant alleges, in the failure to obtain consent. Strictly, the breach is doing the outside work; if consent had been obtained, that would have relieved Dr. Fishel from any liability for breach of contract, but he was under no contractual obligation actually to apply for consent. The question, therefore, is what loss has resulted from the fact that Dr. Fishel did this work. It cannot demonstrate any loss. For reasons given, the University benefited from the work. Indeed, there is doubt whether there would, or could legitimately, have been any complaint had Dr. Fishel done precisely the same work but unpaid by the foreign clinics. If any claim for damages for breach of contract is to succeed,

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22 *Nottingham University v. Fishel,* 2001 (11) Reports of Patents, Designs and Trade Marks cases 367 at pp. 393, 394 (Q.B.D.).

it has to be on the basis that restitutionary damages (or perhaps more accurately, compensation) are available. Mr. Dutton has advanced a further argument that the employee's duty of loyalty and good faith obliged Dr. Fishel to inform the University that he was being paid for his outside work. The argument then is that had the University been aware of the opportunity to do outside work, it would have sought to do it itself. This premise is wrong. It cannot be said that as a general principle an employee is bound to inform his employer if and when he is doing outside work in breach of his contract. Mr. Dutton relied upon the case of *Neary v. Dean of Westminster*,[23] in which Lord Jauncey, sitting as Special Commissioner appointed to hear the case on behalf of Her Majesty the Queen as Visitor, held that in the circumstances of that case the employee in question was in breach of the duty of trust and confidence in failing to inform the Abbey authorities of certain activities he was conducting on his own behalf. However, in that case Lord Jauncey clearly considered that the employee had taken advantage of his position as Organist at the Abbey for his own benefit. In other words, the duty to inform the Abbey authorities arose because Dr. Neary had used his position to earn secret profits; he ought to have accounted for these to his employers in the absence of full disclosure and consent. It is similarly contended in this case that Dr. Fishel was a fiduciary who abused his position for his own benefit. If that is right, then it may be said that by acting in secret Dr. Fishel has both acted in breach of his fiduciary duty and in breach of contract. But the contractual claim then adds nothing to the fiduciary claim. In absence of the fiduciary obligation, the employee is not obliged to disclose the fact that he has earned sums from third parties. Indeed, were he

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[23] *Neary v. Dean of Westminster,* 91999) I.R.L.R. 288.

to be so obliged, this would circumvent the well established rule in *Bell v. Lever Brothers Ltd.*,[24] that employees are not obliged to disclose their own past misconduct or breaches of contract.

Even if the conclusion is wrong that Dr. Fishel was not contractually obliged to disclose his activities to the University, it cannot be considered in any event that the University has shown that it would have taken the contract for itself. This must be established on the balance of probabilities since it is asking what the claimant would have done in the past had there been no breach as referred in *Allied Maples Group v. Simmons and Simmons*.[25] In this case also it was considered that the research benefits were a poor reward for the time involved. The logic of his position is that if he had been fully aware of what was going on, he would not have supported the work on the grounds that it was not in Nurture's interest, whether or not Nurture itself was paid in place of the staff. Similarly, Professor Chiplin, who was Pro-Vice-Chancellor for about four years until July, 1995, said he would not have approved the work because of the length and frequency of the absences abroad. Accordingly, the Court was not satisfied that on the balance of probabilities the University would have elected to do the work even if it had been given the opportunity to do so. Finally, it is clear that it could not in any event have been done without the co-operation of Dr. Fishel himself. He could not have been required to do this work abroad. On the principle that it must be assumed that, he would have acted to limit his damages, he could have refused to work abroad and thereby have scuppered the contracts. Mr. Dutton says

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[24] *Bell v. Lever Brothers Ltd.* (1932) A.C. 161.

[25] *Allied Maples Group v. Simmons and Simmons,* (1995) 1 W.L.R. 1602 at 1610.

that the answer to that is that he did in fact do the work and therefore it should be assumed that he would have done so whoever was the contracting party. However, he did not do the work purely in pursuance of his contract of employment, and it cannot be said why he cannot say that in that different context it should not be assumed that he would have been willing to go beyond his contractual obligations.[26]

12.2 JUSTIFICATION OF HYPOTHESIS:

The hypothesis is put forward by making comparative and analytical study of judicial trend prevailing in England and India on the subject of damages for breach of contract. The impact of court intervention is both qualitative and quantitative with the help of legislations. In the light of the research work, the researcher is free to commence from the principles of breach of contract to construct an argument, which is more in line with facility of exposition and application, while at the same time consonant with the economic reality. The starting point of the said is the nature of the opinion, which is said to arise on breach of contract. That is, whenever there is breach which will cause substantial deprivation of the expected benefit of the contract to the innocent party. The innocent party has the choice to ascertain his right to sue for damages amongst the other remedies available. But by ascertaining this right, the innocent party will have to move on with certain alarming situations.

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[26] *Nottingham University v. Fishel,* 2001 (110 Reports of Patens, Designs and Trade Marks Cases 367 at pp. 391, 392 (Q.B.D.).

(I) The unhelpfulness of the present legal system in certain situations:

The legal rule must be well equipped with clear definition if it is to be properly used. Any sort of lacking in clarity in statutory provision is also responsible to contribute in creating helplessness situation. In certain situations the continued performance by the party who is committing breach seems to be possible but as the legislation provides for remedies for breach of contract, the innocent party feels helplessness in insisting the implementation of a contract in strict jacket manner. In certain situations it is found that continued performance is optimally desirable but somehow the position is that the lacking in "co-operation" attitude also massed up the relationship and ultimately resulted into breach of contract.

The essence of legitimate interest nebulous and wrong legal advice also strongly contributes in creating such situation. In *White & Carter (Councils) Ltd. v. McGregor*,[27] its creator Lord Reid did not trouble himself to describe exactly or positively what constitutes a legitimate interest, though we know that it includes not merely wishing to increase the damages payable and so one could very well imagine the predicament of both plaintiff and defendant counsel.

In *Clea Shipping Corporation v. Bulk Oil International Ltd. (The Alaskan Trader)*[28] as to what should be argued. It has been urged that the difficulty of calculating damages for the

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27 *White & Carter (Councils) Ltd. v. McGregor,* [1962] A.C. 413; [1962] 2 W.L.R. 17; 105 S.J. 1104; [1961] 3 All E.R. 1178; 1962 S.C.H.L. 1; 1962 S.L.T. 9, H.L.

28 *Clea Shipping Corporation v. Bulk Oil International Ltd.* (The Alaskan Trader), (1984) 1 All ER 129.

breach would be one ground on which to found a legitimate interest and also the difficulty of mitigating the loss which might arise. Yet it is to be questioned, with all respect, whether either of these is helpful or indeed relevant.

(II) Difficulty of assessment of damages:

This has remained up to now one of the most capricious concepts of English law rivaled only by the "floodgates of litigation" and the "unruly horse of public policy" but damages for breach of contract to negotiate for fare and reasonable sum would be overly so.[29] It can be called in aid[30] or rejected[31] whatever the need arises, a classic case knife and pick-axe.[32] To argue here that the factor of difficulty in assessing the damages gives a party a sufficiently legitimate interest to continue performance appears dangerous. It places in the hands of the innocent party a passport to specific performance of the contract or worse. Who is to determine the sufficiently difficult standard? What of an honest though unreasonable mistaken belief that damages would be difficult to assess? Why should a layman be called upon to decide a question that may stump the court, as it has? Are the damages difficult to assess? Too difficult? It is submitted that this aspect of the legitimate interest theory serves only to becloud the issue further. One aim of the court should be to prevent unnecessary waste. To permit an unwanted continued

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29 *Courtney and Fairbarn Ltd. v. Tolaini Bros (Hotels) Ltd.,* (1975) 1 All ER 716; *Mallozi v. Carpelli,* (1976) 1 LL LR 407; *Danwin Productions Ltd. v. EMI Films Ltd.,* (1984) Times 9 March.

30 *Vigars v. Cook,* (1919) 2 K.B. 475; *Sapwell v. Bass,* (1910) 2 KB 486.

31 *Chaplin v. Hick,* (1911) 2 KB 786; *Manubens v. Leon,* (1919) 1 KB 208.

32 Swan & Reiter, *Contracts: Cases, Notes and Materials* 2-55 (1978).

performance on the ground that the innocent party finds the resultant damage too difficult to assess in monetary terms smacks of that exactly.

(III) Difficulty of mitigation:

Far from being a reason for continuation of an undesired performance this would seem at best to be an item to be considered in the final assessment of damages. There is no "duty" as such cast on a party to mitigate.[33] Why should the fact that he cannot do so afford him rights over the other party? Even if it were to be conceded that it would be useful to have a continued performance else a great investment of either property or skill would be wasted, yet this ought not to sound in total liability for the repudiator. First, it is neither at his request nor for his benefit and second, it bears no relation to the mitigation factor as such. It is ultimately an effort to prevent total waste rather than one to reduce losses of the innocent party. In fact, it might be contended that continued performance will increase the losses, so that the argument is absurd. The difficulty of mitigation it is submitted therefore ought not to be relevant in determining whether or not a legitimate interest exists.

Another limitation which seemingly and cumulatively exists on this right to continued performance is that there be no need for the co-operation for the repudiator in order for the innocent party to be able to continue performance.[34] This did not arise in the *Clea Shipping Corporation v. Bulk Oil International Ltd.* (The Alaskan Trader). [35] There, on the

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33 *The Solholt* (1981) 2 Lloyds Rep. 574 at 580.

34 *Finelli v. Dec,* (1986) DLr (2d.) 393 (ont. CA) Cf

35 *Clea Shipping Corporation v. Bulk Oil International Ltd.* (The Alaskan Trader), (1984) 1 All ER 129.

present view of the law, the carpenter can only continue building the kennels if he is constructing them on his premise. If they are being constructed on the premises of the dog owner then he could not continue performance.[36] For a contractual right as valuable as this to arise by virtue of the fortuity of its place of performance (whether expressed or implied) reduces the option to a mere lottery. The parties would have bargained on the assumption that the agreement would have been performed and not aborted; now depending on where the performance was to be in our case, there may or may not be a right to continue performance or to accept the repudiation and claim damages respectively. The facts of *White & Carter (Councils) Ltd. v. McGregor*,[37] demonstrate clearly the fortuity factor in the analysis. In normal circumstances, the material for the advertisements would have had to be supplied by the defendants but it so happened that these advertisements were the same as those in previous contracts between the parties. By this circumstance, the plaintiffs were entitled to continue a knowingly undesired performance. But how is their position distinguishable in substance from that of the first time adviser with no prior information to go on? Is the issue basically one of fact, that is, is it possible for there to be continued performance or not? It would arguably be a fairer system where the right depended on something less haphazard.

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36 *George Baker Transport Ltd. v. Eynon,* (1974) 1 WLR 462; *Denmark Productions Ltd. v. Buscobet Productions Ltd.,* (1969) 1 QB 699.

37 *White & Carter (Councils) Ltd. v. McGregor,* [1962] A.C. 413; [1962] 2 W.L.R. 17; 105 S.J. 1104; [1961] 3 All E.R. 1178; 1962 S.C.H.L. 1; 1962 S.L.T. 9, H.L.

In any even, what does cooperation mean in this context? Lord Reid used it as an alternative to assent.[38] So if *A* is building a kennel for *B*, a dot owner who has informed *A* that he no longer wants it, then it can be argued that *A* does not have *B*'s cooperation to continue performance. It certainly cannot be said that he has *B*'s assent. On this analysis, the innocent party should be unable to continue performance until he has the "go ahead" from the repudiator. Yet, by virtue of the fact that the plaintiff in *White & Carter (Councils) Ltd. v. McGregor*,[39] was allowed to continue it must be taken that assent alone is not necessary.[40] This limitation also is unhelpful. First, it seems far too capricious to be the bedrock of a principle in a refined legal system and second, it is unclear and perhaps meaningless.

Added to the submitted unhelpfulness of these limitations is the fact that they are of dubious legal authority. The point may now be academic but in *White & Carter (Councils) Ltd. v. McGregor*,[41] Lord Reid was the only one of the bare majority who alluded to them. Megarry J. (as he then was) reasoned in *Hounslow LBC v. Twickenham Garden Development Ltd.*[42] that there was no need to hold that the decision of the majority of a bare majority should be considered the true decision in the case. But, with all

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38 *White & Carter (Councils) Ltd. v. McGregor,* [1962] A.C. 413; [1962] 2 W.L.R. 17; 105 S.J. 1104; [1961] 3 All E.R. 1178; 1962 S.C.H.L. 1; 1962 S.L.T. 9, H.L.

39 *White & Carter (Councils) Ltd. v. McGregor,* [1962] A.C. 413; [1962] 2 W.L.R. 17; 105 S.J. 1104; [1961] 3 All E.R. 1178; 1962 S.C.H.L. 1; 1962 S.L.T. 9, H.L.

40 *Roberts v. Ellwells Engineering Ltd.,* (1972) QB 586.

41 *White & Carter (Councils) Ltd. v. McGregor,* [1962] A.C. 413; [1962] 2 W.L.R. 17; 105 S.J. 1104; [1961] 3 All E.R. 1178; 1962 S.C.H.L. 1; 1962 S.L.T. 9, H.L.

42 *Hounslow LBC v. Twickenham Garden Development Ltd.,* (1970) 3 All ER 326.

respect, one wonders how it can be otherwise, short of ignoring the obvious mathematical aspect of the problem. Without Lord Reid, it is true; there would have been no majority but then the question would not have arisen either. Is it his consideration for his association with the other two that his *ratio decidendi* be the *ratio decidendi* of the case? Not unless the tail wags the dog! The submission therefore, is that the limitations on the right to continue performance are both unhelpful and dubious legal validity.

(IV) The problem of mitigation even if there is duty to mitigate:

It is often argued that it seems to be generally accepted that the duty to mitigate or reduce loss in a contractual context arises only on breach of contract. But even if (it is assumed without admission) there is no breach until accepted as such, there is still a duty to mitigate. The duty to mitigate is not a mere appendage to a breach of contract but must be viewed in the loss allocation context. Certain principles governed the allocation of loss and one of these is that the loss will be borne by the person who caused it i.e. by the guilty mind who is responsible for committing breach. Why avoidable loss is not recoverable and conjointly why one should take reasonable steps to reduce loss, is that where a loss to occur as result of these steps not having been taken, it would be held that the loss would have been legally caused by the omission of the person who could have very well avoided it.[43] Thus the other party will not be held responsible. True it is that loss will be caused most often by breach in a contract setting but surely too it

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[43] *Brace v. Calder,* (1895) 2 KB 253; *British Westinghouse Electric Co. v. Underground Electric Rly Co.,* (1912) AC 673; *Jamal and Moola Dawood Sons & Co.,* (1916) AC 175; *Payzu Ltd. v. Saunders,* (1919) 2 KB 581.

may be caused by any conduct, which can potentially amount to malperformance of one's promised obligations.[44] Mitigation would, therefore, be relevant whenever loss is foreseen, the potential sufferer should do all that is reasonably practicable to alleviate it. In the final analysis, just as a breach of contract may lead one to fear an impending loss so too may an unretracted repudiation. Until it is retracted the innocent party ought reasonably to foresee that he will be disappointed in his expectations and will suffer a loss. At such a stage the duty to mitigate would arise in both its aspects. Thus, one can readily acknowledged that mitigation involves the taking reasonable steps to reduce the loss seemingly less highlighted is that the mitigator must also refrain from taking steps which would reasonably increase the loss.

12.3 SUGGESTIONS FOR FUTURE ACTION:

(I) It is indeed true that damages can never be an exact science; it is more a compromise or adjustment. At the same time, there is no denial to the fact that the people involved with a commercial transaction have their own working style and limitations while dealing with the contractual matter, breach arising out of contract and the compromise to be made in the situation of breach of contract. The business people still have hesitation or rather one can say fear of a lengthy court proceeding and the tedious technicalities of the proceedings. From the comparative and analytical study on judicial trend prevailing in England and Indian on the subject of damages for breach of contract the researcher found that in India, the concept

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[44] *Rockingham County v. Luten Bridge Co.,* 35 F 2d. 301; *Evans v. Yakina Valley Grape Growers Association,* 108 P 2d 671 at 683 (1988).

of nominal damages is yet not developed to the extent in which it is developed in England. Even in the circumstances when legal breach of contract is proved but if the party who is making grievance for such breach has not suffered any monetary loss out of it is still required to face certain hassles in the litigation. It is submitted that there is a dire need that now in such situation the courts in India should also come up heavily on the party responsible for committing breach after the contract is being made and breach is being proved, even if the nature of damages which is required to be awarded is nominal damages.

(II) 'Aggravated damages', which are compensatory in that they compensate the victim of a wrong for mental distress, or injury, in circumstances in which that injury has been caused or increased by the manner in which the defendant committed the wrong, or the defendant's conduct subsequent to the wrong. The concept of such aggravated damages is not developed at it fullest as far as the contractual obligation is concerned.

(III) 'Exemplary damages' are intended to make an example of the defendant; they are punitive and not intended to compensate the plaintiff for any loss, but rather to punish the defendant. The important question which is arising on and often before the courts of Law in India is whether once the litigation gets over and the verdict being given by the competent court regarding the particular issue of damages arising out of breach of contract, is there any need to award exemplary damages? After going through the number of judicial pronouncements, it is observed that courts in India are, even today, liberal enough in not exercising its power in awarding compensation or damage under the head of

exemplary damages or punitive damages. And the liberal approach of the Hon'ble courts in India has always been misused and underestimated by the party who is responsible for breach of contract just because of the reason that the courts of law in India is yet not harsh, strict and quite enough to award exemplary damages like the courts in England.

(IV) The concept of vindictive damages or retributory damages is also not found in the judgment delivered by the Indian courts. Indian legal system is still lacking in awarding damages under this head. For the proper utilization and implementation of law of damages for breach of contract the Hon'ble Courts should be strict enough in awarding damages under this head also.

(V) Even after suffering with the heavy losses because of the breach committed by the other side it is the plaintiff only who will have to prove that he has suffered with the losses. This seems to be one of the most painful and helpless situations for the litigant who is knocking the doors of the courts of law with folded hands and with great faith in the system. A Criss-cross between two recent judgments of the Hon'ble Delhi High Court in *Union of India v. T.D.L. Patel*[45] and *Union of India v. M/s. Commercial Metal Corpn.*[46] triggered off a controversy, unfolded hitherto such magnitude : whether, on breach of contract by the defendant-seller, the plaintiff-buyer is liable to prove his loss on actual purchase of similar (substituted) goods to enable him to vindicate his claim for damages in a court of law? In other words, are the courts debarred from awarding

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45 *Union of India v. T.D.L. Patel,* AIR 1971 Del. 120.

46 *Union of India v. M/s. Commercial Metal Corpn.,* AIR 1982 Del. 267 at 271.

damages without there being an actual loss due to no-purchase? If so, will not this theory knock the bottom out of the law of damages, because it will annihilate the notional assumption of loss, based upon the difference between market price and contract price?

(VI) The present state of the law as far as concept for damages for breach of contract is concerned, is still unsatisfactory as there is no system, which provides some sort of penal consequences for committing breach. This is perhaps one of the strongest reasons that the promise, which is given voluntarily by the party at time of entering into contract, is taken so casually by the same party at the time of committing breach of it.

(VII) Researcher strongly feels that the system is unsatisfactory to the extent that the damages for breach of contract being a litigation of a commercial nature, not well equipped with any sort of alternative dispute redressal machinery. Some time the party may not really intend to commit breach or rather we may say that party who is committing breach also has the strong willingness to continue with the contract and to perform his part of obligation but because of, lack of proper and genuine legal advice about the benefit to perform his part of obligation and the consequences arising out of non-fulfillment of obligation, the party commit blunder to discontinue with the contract and by that makes himself guilty for breach of contract.